Supreme Court, U.S.
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No. 031569

IN THE

Supreme Court of the United States

DONALD MARTIN, Individually,

Petitioner,

v.

DECOMA LOVE-LANE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the majority of the Fourth Circuit panel disregard the standards set forth by this Court in *Saucier v. Katz* when it relied on its summary judgment findings on the elements of Plaintiff's free speech claim when analyzing Petitioner Martin's motion for summary judgment on qualified immunity?

Did the majority of the Fourth Circuit panel disregard the standards set forth by this Court in *Anderson v. Creighton* when it failed to consider undisputed evidence that was unfavorable to Plaintiff when analyzing Petitioner Martin's motion for summary judgment on qualified immunity?

PARTIES TO THE PROCEEDINGS

Petitioner Donald Martin, in his individual capacity, was a defendant and an appellee in the proceedings below. Respondent DeComa Love-Lane was the plaintiff and appellant in the proceedings below. Winton-Salem/Forsyth County Board of Education and Donald Martin, in his official capacity, also were defendants and appellees in the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Donald Martin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 355 F.3d 766. The opinion of the district court (Pet. App. 65a) is reported at 201 F. Supp. 2d 566.

JURISDICTION

The Fourth Circuit's decision was entered on January 22, 2004, and its order denying Petitioner Martin's timely petition for rehearing en banc was entered on February 18, 2004 (Pet. App. 95a). Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. Amend. I.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

This case presents issues regarding the proper application of this Court's established standards for determining a public official's entitlement to qualified immunity. More specifically, this case presents this Court the opportunity to address these standards in the context of a public school official's entitlement to qualified immunity in light of a school employee's allegations of free speech retaliation, a context in which this Court has not previously given guidance. Indeed, this lack of guidance likely set the stage for the diverging analyses of qualified immunity presented by the majority of the panel of the Fourth Circuit

and dissenting Judge Wilkinson in this case. As Judge Wilkinson summarized,

> In short, at the time Martin decided to reassign Love-lane in 1998, prior cases would not have given him any reason to believe that he was acting unlawfully—much less that his unlawfulness was clearly established. The Supreme Court's prior case law, not to mention our own, did not require Martin to ignore reports of obscenity-laden shouting matches in Lewisville's hallways; widespread complaints from his teachers, and indeed his own subordinates, about Love-Lane's unprofessional manner; and evidence of a bitter feud between members of Lewisville's administrative team.
>
> One cannot help but wonder what the majority would now require of superintendents like Martin.

Pet. App. 58a.

1. Undisputed Facts Regarding Love-Lane's Conduct and Superintendent Martin's Reaction.

During Respondent DeComa Love-Lane's three-year tenure as assistant principal at Lewisville Elementary, she became entwined in clashes with several teachers, as well as her supervising principal, Brenda Blanchfield ("Blanchfield"). These conflicts spanned numerous topics—from such insignificant administrative matters as where to stand during bus duty to issues like disciplinary practices which Love-Lane perceived to be racially discriminatory. J.A. 131, 740, 823, 858-59, 866-69, 955, 968-69, 1153, 1252. These conflicts escalated throughout Love-Lane's tenure at Lewisville Elementary and led to the involvement of two different Assistant Superintendents, as well as direct involvement by Petitioner Superintendent Donald Martin. J.A. 165, 289, 968-69, 1002-03. Superintendent Martin received reports from his Assistant

Superintendents regarding Love-Lane's disrespectful conduct toward her Principal and various faculty, and then he observed her behavior first hand in meetings where she refused to follow even the most minor of her supervisor's instructions. J.A. 165, 289, 968-69, 1002-03. In a final effort to get Love-Lane and Blanchfield to work together, Martin prepared an October 28, 1997 memo in which he concluded the administration of the school had been adversely affected and outlined his expectations for both of them for that school year. J.A. 166-67, 172-73, 471-75, 688-92, 741, 969, 976-80.

Even after Martin issued that memo, Love-Lane continued her disruptive behavior. J.A. 162-64, 185-88. Indeed, in January 1998, a group of Fifth-Grade teachers took concerns directly to Martin regarding Love-Lane's communications and interactions with them. J.A. 725, 825-26, 957-58, 970-71, 1155-56. Similarly, Assistant Superintendent Bell reported continued difficulties with Love-Lane. J.A. 287-90, 970-71.

In the spring of 1998, Martin reorganized the administrative team at Lewisville, returning Love-Lane to a teacher position, J.A. 290, 297, 971-73, 986, and moving Blanchfield to an administrative position at the home office with a reduction in pay, J.A. 290, 735, 742-43, 971-72.

2. The District Court's Grant of Summary Judgment.

Pursuant to its federal question jurisdiction, 28 U.S.C. § 1331, 42 U.S.C. § 1983, the district court considered the undisputed evidence in this case and granted summary judgment in favor of Defendants on all of Plaintiff's claims. Specifically with regard to her free speech retaliation claim against Martin individually, the district court explained that Love-Lane's speech regarding discriminatory discipline was intertwined with her personal difficulties in getting along with her Principal and was expressed in a context that "was

more in her capacity as a public school administrator than as a private citizen." Pet. App. 84a. Therefore, the district court concluded that her speech was not on a matter of public concern. Pet. App. 84a. In addition, the district court pointed to "substantial evidence of the disruption and destruction of working relationships caused by Plaintiff's expression, some of it by Plaintiff's own admission," to conclude that "Defendants' interest in maintaining the effective functioning of Lewisville by removing Plaintiff, a disruptive and dividing influence, far outweighs Plaintiff's interest in First Amendment expression." Pet. App. 84a-85a.

The district court also considered Martin's qualified immunity defense and concluded that Martin was entitled to qualified immunity with regard to Love-Lane's free speech claims. The district court explained that "Plaintiff's expression . . . occurred in school forums and primarily comprised complaints about her supervisor's judgment and the day to day functioning of the school." Pet. App. 91a. Under such circumstances, neither "Martin, [n]or a reasonable person in his position, would have known that his conduct violated Plaintiff's clearly established rights." Pet. App. 90a.

3. Reversal by the Majority of the Fourth Circuit Panel.

The majority of the Fourth Circuit panel affirmed summary judgment on seventeen of the eighteen claims Love-Lane appealed from the district court. Love-Lane's free speech claim against Martin individually was the only claim on which the majority of the Fourth Circuit reversed summary judgment. Pet. App. 1a-2a. To reach its reversal decision, the majority isolated Love-Lane's speech regarding discriminatory discipline from the rest of the undisputed evidence about her intertwined disruptive conduct and gripes about administrative issues, and it

disregarded much of this undisputed evidence that was unfavorable to Love-Lane. Pet. App. 16a-22a, 43a, 53a-54a. Having found that Love-Lane's speech was on a matter of public concern and that her interest in speaking outweighed the school's interests in maintaining a productive, undisrupted educational environment, the majority went on to deny Martin qualified immunity by deciding that those same conclusions would have been clear to a reasonable superintendent in Martin's situation. Pet. App. 29a-32a.

In contrast, Judge Wilkinson's dissent emphasized this Court's admonition in *Anderson v. Creighton* that qualified immunity "protects government officials 'as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.'" Pet. App. 48a (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). Judge Wilkinson, in describing the majority's mistakes under this analysis, specifically pointed out the undisputed evidence disregarded by the majority and explained that if such undisputed evidence had been considered, it would not have been possible to conclude that it would have been clear to a reasonable superintendent, like Martin, that his conduct toward Love-Lane violated the law. Pet. App. 56a-58a. He emphasized the magnitude of the error in the majority's approach as follows:

> We have never accorded so little deference to the views of public school administrators or such short shrift to well-established principles of qualified immunity. Under the majority's regime, courts, not schools themselves, will have the final word on questions of school discipline. And with lawsuits waiting in the wings, principals and superintendents will be reluctant to do their part in resolving disciplinary problems or in reconstituting dysfunctional administrative teams.

Pet. App. 61a-62a.

REASONS FOR GRANTING THE WRIT

This case presents a conflict between the decision of the majority of the Fourth Circuit panel and two key decisions of this Court: *Saucier v. Katz*, 533 U.S. 194 (2001), which establishes two distinct analytical steps to determining a public official's entitlement to qualified immunity, and *Anderson v. Creighton*, 483 U.S. 635 (1987), which requires qualified immunity to be analyzed with due regard for the information available to the public official. The decision below, however, ignores the requirements of these decisions. As a result, the majority of the Fourth Circuit panel reversed the district court's grant of summary judgment to Martin and instructed that he, a public school superintendent, be subjected to a trial on the merits of whether or not he, individually, violated Love-Lane's free speech rights. This Court repeatedly has acknowledged and emphasized the substantial public policy considerations that weigh against subjecting a public official like Superintendent Martin to a full trial, in his individual capacity, on the merits of a constitutional claim. To further these public policy considerations, it is critical that this Court grant review to resolve inconsistencies in the lower Courts and to prevent its established standards from being bypassed to the detriment of the public education system.

I. THE COURT OF APPEALS DISREGARDED *SAUCIER V. KATZ*

This Court has held that a public official is entitled to qualified immunity unless "[t]he contours of the right [allegedly violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. In *Saucier v. Katz*, this Court considered whether this standard requires an analysis independent from a court's analysis of the elements of the underlying claim when considering a public official's

motion for summary judgment on qualified immunity. 533 U.S. at 200. In *Saucier*, the court of appeals had found it unnecessary to perform such an independent analysis because the elements of the underlying claim were subject to a reasonable official standard, just as qualified immunity is subject to a reasonable official standard. *Id.* at 199-200. This Court held that the court of appeals' approach was wrong. *Id.* at 202.

Specifically, this Court made it clear in *Saucier*, that there are two independent steps in the qualified immunity analysis: "the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered on a more specific level . . . ." *Id.* at 200 (emphasis added). This Court went on to explain at great length the importance of making an individualized fact-specific inquiry on qualified immunity that is distinct from the question of whether there has been a constitutional violation. *Id.* at 201-07. The majority of the Fourth Circuit in this case found at the summary judgment stage that Love-Lane had set forth facts sufficient to support her claim of violation of her free speech rights—the first step in the analysis. Pet. App. 16a-27a. When it considered the second part of the inquiry, however, it did exactly what this Court warned against in *Saucier*. It did not analyze this question in a context any more particularized than it did in evaluating the underlying elements of Love-Lane's claim. It simply relied upon its previous analysis of the elements of Love-Lane's claim:

> In light of this earlier discussion, we are persuaded that the interests to be balanced under *Pickering* weigh so heavily in Love-Lane's favor that her right to speak about race discrimination in a public school was clearly established well before 1997 and 1998.

* * *

> Because case law had confirmed Love-Lane's right to speak and because the *Pickering* balancing test tips decidedly in her favor, we hold that any reasonable school superintendent in Martin's position in 1997 and 1998 would have realized that he would violate the Constitution if he, in fact, took adverse employment action against Love-Lane for speaking out about race discrimination at Lewisville Elementary School.

Pet. App. 30a, 31a; *see Anderson*, 483 U.S. at 638 (invalidating a similarly simplistic holding in the context of a warrantless search).

The majority's lack of distinct analysis on qualified immunity is particularly troubling because the underlying elements of Love-Lane's claim of violation of her free speech rights are subject to both (1) a context-specific analysis of whether or not her speech was on a matter of public concern and (2) the *Pickering* requirement that her interests in speaking be balanced against Martin's interests as a superintendent in maintaining the efficient and effective functioning of the school. Pet. App. 19a; *Connick v. Myers*, 461 U.S. 138, 147-49 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). This balancing test is commonly regarded as individualized, fact intensive, difficult to apply, not well-defined, and varying depending upon the type of speech involved. *Connick*, 461 U.S. at 152; *Di Meglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995); *Dahm v. Flynn*, 60 F.3d 253, 261 (7th Cir. 1994); *Grantham v. Trickery*, 21 F.3d 289, 293 (8th Cir. 1994); *Noyola v. Texas Dep't of Human Res.*, 846 F.2d 1021, 1025 (5th Cir. 1988). Indeed, courts generally agree that because of these attributes of the balancing test, the results of it can rarely be considered clearly established for purposes of qualified immunity. *Fabiano v. Hopkins*, 352 F.3d 447, 457 (1st Cir. 2003); *Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1275 (11th Cir. 2000); *Lytle v. Wondrash*, 182 F.3d 1083, 1089

(9th Cir. 1999); *Di Meglio*, 45 F.3d at 806; *Dahm*, 60 F.3d at 261; *Grantham*, 21 F.3d at 293; *Noyola*, 846 F.2d at 1025.

Thus, to be consistent with *Saucier*, the court of appeals should have independently considered whether or not it would have been "clear to [Martin or] a reasonable officer that his conduct was unlawful in the situation he confronted". *Saucier*, 533 U.S. at 202. It should not have simply held that because it found Love-Lane's speech to be on a matter of public concern and it found the *Pickering* balancing test to favor Love-Lane, so too would a reasonable superintendent in Martin's situation. Indeed, of the four judges who have considered this case already (the district court judge and the three members of the Fourth Circuit panel), two found (when considering the undisputed facts in the light most favorable to Love-Lane), that Love-Lane's speech was not on a matter of public concern and that the *Pickering* balancing did not favor Love-Lane. Pet. App. 49a-55a, 82a-86a; *see Wilson v. Layne*, 526 U.S. 603 (1999) (stating that "[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy").

II. THE COURT OF APPEALS DISREGARDED *ANDERSON V. CREIGHTON*

In *Anderson*, this Court elaborated on the requirement that qualified immunity be analyzed in a "more particularized" sense. *Anderson*, 483 U.S. at 640. Specifically, this Court explained in the context of a warrantless search claim that "the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials." *Id.* at 641 (emphasis added). This Court noted that this remains an

objective analysis of "whether a reasonable officer could have believed [the] warrrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. [The] subjective beliefs about the search are irrelevant." *Id.* The objective analysis, however, needs to include information undisputedly possessed by the public officials in light of clearly established law. *Id.*

Here, not only did the majority of the Fourth Circuit panel fail to perform an independent analysis as required under *Saucier*, *supra* § I, the entire analysis it did perform was in disregard of *Anderson*'s explanation about the appropriate evidence that must be reviewed. The majority of the Fourth Circuit panel did not consider substantial undisputed evidence that made up the information and circumstances known to Superintendent Martin when he was determining whether or not Love-Lane engaged in speech on a matter of public concern and whether or not her interest in speaking on that matter outweighed Martin's interests as a Superintendent in maintaining a cohesive, undisrupted environment in which students can learn. Indeed, this failing by the majority was repeatedly pointed out by Judge Wilkinson in his dissent:

> Taking the facts in the light most favorable to DeComa Love-Lane, as we must, does not mean ignoring facts unfavorable to Love-Lane that are not in dispute. Teachers and administrators, whatever their gender or race, found Love-Lane's demeanor unprofessional and contentious. By failing to consider this uncontroverted evidence, the majority converts an ordinary personnel decision into a constitutional cause of action.
>
> * * *
>
> Of the dozens of witnesses whose statements appear in the record, not a single member of Lewisville's administration or the school system's central office says

> that Love-Lane acted professionally. As a result, the majority relies primarily on Love-Lane's own assertions that she never acted unprofessionally, but Love-Lane's assertions are entirely unsupported by the record. Four investigations of the Anderson incident concluded that Love-Lane had acted unprofessionally; her principal and the faculty had been alienated by a series of incidents having nothing to do with race; and of course every administrator who intervened at Lewisville, regardless of their gender or race, found Love-Lane's tone and demeanor inappropriately hostile. The majority does not dispute any of this evidence; it simply ignores it.
>
> * * *
>
> The majority instead repeatedly points out that this case arises on a motion for summary judgment . . . And on that we certainly agree. In ignoring the wealth of undisputed facts, however, the majority accords little respect to the record or to the views of school administrators.

Pet. App. 43a, 54a-55a (emphasis added). Judge Wilkinson described the proper analysis succinctly as follows:

> In short, at the time Martin decided to reassign Love-lane in 1998, prior cases would not have given him any reason to believe that he was acting unlawfully—much less that his unlawfulness was clearly established. The Supreme Court's prior case law, not to mention our own, did not require Martin to ignore reports of obscenity-laden shouting matches in Lewisville's hallways; widespread complaints from his teachers, and indeed his own subordinates, about Love-Lane's unprofessional manner; and evidence of a bitter feud between members of Lewisville's administrative team.

Pet. App. 58a.

When the whole of the undisputed evidence available to Martin is considered, "pre-existing law supported the legality of Martin's decision. The disruptiveness of Love-Lane's conduct gave Martin every reason to believe that the *Pickering* balance swung in the school system's favor." Pet. App. 57a (Wilkinson, J., dissenting). Neither this Court's precedents nor those of other courts would have required Martin, as the majority did, to conclude that he could take no action until Love-Lane's speech was "disruptive to the point of jeopardizing the welfare of the children", Pet. App. 31a. *See, e.g., Fales v. Garst*, 235 F.3d 1122, 1124 (8th Cir. 2001) (evaluating similar facts and concluding they weighed against finding the speech was protected because "plaintiffs' speech resulted in school factions and disharmony among their coworkers and negatively impacted [the principal]'s interest in efficiently administering the middle school. . . . Ultimately, the middle school became polarized, dividing into pro- and anti-[principal] groups"); *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1200-01 (9th Cir. 2000) (explaining that speech was not entitled to protection under the balancing test when it (1) "was conducive to racial and gender tension, . . . [(2) led] to the development of 'camps' of people, often based on race or gender . . . [and (3)] while touching on racial and gender equality issues, largely involved internal office matters, particularly one supervisor"); *Derrickson v. Bd. of Educ. of St. Louis*, 738 F.2d 351, 353 (8th Cir. 1984) (concluding that "the disruptive manner and frequency of . . . internal criticisms weighted heavily against first amendment protection of those activities when placed on the *Pickering* balance"); *see generally Connick*, 461 U.S. at 152 (1983) ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."); *see also* cases cited at Pet App. 53a.

III. THIS CASE PRESENTS A CONFLICT WITH OTHER CIRCUIT CASES.

The difference between the majority of the Fourth Circuit's opinion and that of dissenting Judge Wilkinson is illustrative of a broader conflict among courts. Perhaps because *Anderson* and *Saucier* are not in the free speech context, their requirement of a qualified immunity analysis distinct from the analysis of the elements of the underlying claim and inclusive of all undisputed evidence is sometimes missing from cases analyzing qualified immunity in the context of free speech claims. *See, e.g.*, Pet. App. 1a-41a (majority opinion, with no reference to *Anderson* or *Saucier*); *Catletti v. Rampe*, 334 F.3d 225, 231 (2nd Cir. 2003) (performing no independent analysis). In contrast, some courts do strictly adhere to the requirements of a qualified immunity analysis truly distinct from the analysis of the elements of the claims, which includes consideration of undisputed evidence known to the public official. *See, e.g., Fabiano v. Hopkins*, 352 F.3d 447, 457-58 (1st Cir. 2003) (concluding elements of First Amendment claim could be met, but analyzing again with regard to evidence about public officials' knowledge to conclude they were entitled to qualified immunity); *Stanley v. City of Dalton*, 219 F.3d 1280, 1294, 1298 (11th Cir. 2000) (applying distinct analysis and describing that analysis as including "the precise information Stanley had before his GBI interview and Chadwick possessed about Stanley's misconduct before terminating him").

Granting reviewing in this case would allow this Court to remedy such inconsistencies and provide clear guidance on the application of qualified immunity in the context of free speech claims by public employees.

IV. THIS CASE PRESENTS IMPORTANT AND RECURRING FEDERAL QUESTIONS.

This Court has repeatedly emphasized that qualified immunity is a substantial safeguard, necessary to protect society from such costs as "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. . . . [as well as] the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public] officials], in the unflinching discharge of their duties.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982), (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2nd Cir. 1949)); *accord Anderson*, 483 U.S. at 638. As pointed out by Judge Wilkinson in his dissent in this case, these policy considerations are of paramount concern in the educational context in which this case arises:

> If decisions like Martin's are going to sow the seeds of federal actions, school administrators will either be cowed into inaction or they will seek the greener pastures of private schools, where education, not litigation, remains the top priority. I am well aware that many children "do[] not have the option of going to a private school or somewhere else," ante at 786, but the teachers and principals who educate them do—and the majority is chasing them from public schools. That is a shame, because public education represents something quite special in this country—the opportunity for Americans of all races and ethnicities and backgrounds to prepare together for the challenges and responsibilities of citizenship.

Pet. App. 63a.

Indeed, in *Crawford-El v. Britton*, this Court acknowledged that many of these substantial policy considerations "would provide support for a procedural rule

that makes it harder for any plaintiff, especially one whose constitutional claim requires proof of an improper motive, to survive a motion for summary judgment." 523 U.S. 574, 591 (1998). Nevertheless, this Court declined to establish such heightened procedural protections, instead concluding that "existing law already prevents this more narrow element of unconstitutional motive from automatically carrying a plaintiff to trial." *Id.* at 592. Because no unique or additional procedural protections are available, it is imperative that courts of appeals are not allowed to disregard this Court's established precedent when considering a public official's motion for summary judgment on the basis of qualified immunity. That means, when considering a motion for summary judgment based on qualified immunity, courts must consistently consider all undisputed evidence, favorable to plaintiff and unfavorable to plaintiff, and they must conduct an analysis independent of their analysis of the elements of plaintiff's underlying claim.

CONCLUSION

By failing to apply *Saucier* and *Anderson*, the majority of the Fourth Circuit panel used its summary judgment findings of protected speech to deny Defendant Martin qualified immunity, without performing an independent qualified immunity analysis that included consideration of undisputed evidence regarding information available to Martin. This Court should not allow such disregard of Supreme Court precedent, particularly where this Court has repeatedly acknowledged the importance of the public policy interests affected by denial of qualified immunity in this case. Accordingly, this petition for writ of certiorari should be granted.

Respectfully submitted,

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May, 2004

APPENDICES

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

DECOMA LOVE-LANE,
Plaintiff-Appellant,
v.
DONALD MARTIN, Individually, and in his official capacity as Superintendent of THE WINSTON-SALEM/FORSYTH COUNTY SCHOOLS; WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION,
Defendants-Appellees.

No. 02-1465

January 22, 2004.

MICHAEL, Circuit Judge

Decoma Love-Lane, an African American, sued the Winston-Salem/Forsyth County, North Carolina, Board of Education (the Board) and its superintendent, Dr. Donald Martin, in the Middle District of North Carolina, alleging that she was demoted from the position of assistant principal to teacher because she spoke out against race discrimination (her free speech claims) and because of her race (her discrimination claims). The district court granted summary judgment to the Board and Martin on all of Love-Lane's claims, and she appeals. We conclude that Love-Lane has raised a genuine issue of material fact as to whether she was demoted in retaliation for her speech, which would be a violation of the First Amendment. We also conclude that Martin is not entitled, in his individual capacity, to qualified immunity on Love-Lane's First Amendment claim, and we therefore vacate the grant of summary judgment to Martin individually on that claim. We affirm the grant of summary judgment (1) to the

Board, and to Martin in his official capacity, on Love-Lane's First Amendment claim, (2) to both defendants on her federal race discrimination claims, and (3) to both defendants on her free speech and race discrimination claims asserted under the North Carolina Constitution.

I.

Love-Lane is employed by the Winston-Salem/Forsyth County Board of Education. She worked for the Board as a high school teacher from 1974 until 1988, and from 1988 until 1998 she was an assistant principal at four middle and elementary schools. In her first three jobs as assistant principal, which spanned seven years (1988-95), Love-Lane consistently received evaluations of excellent or superior in almost all aspects of her performance; she was told that her strongest skills were in the areas of communication and problem solving. J.A. 2000. Each of the principals for whom she worked in these years recommended her for promotion. J.A. 1199-2000.

During the summer of 1995, Superintendent Martin notified Love-Lane that she would be assigned the job of assistant principal at Lewisville Elementary School, where Martin said "an African-American presence" was needed. J.A. 1444. Love-Lane expressed concern to Martin about the assignment because she had heard that Lewisville's principal, Brenda Blanchfield, who is white, had difficulty in dealing with African American assistants. Love-Lane also understood that there were racial tensions at Lewisville because Blanchfield had been ineffective or insensitive in addressing the problems and concerns of African American teachers, students, and parents. J.A. 362, 366-67, 594, 1164, 1201, 1215. Love-Lane's understanding was accurate. According to one African American teacher, "serious racial tension" developed between the school administration and staff at

Lewisville after Blanchfield "took over as principal." J.A. 362. For instance, on one occasion the Lewisville faculty was discussing time options for a satellite PTA meeting in East Winston, a predominantly African American community served by the school. When a late afternoon meeting was proposed, several teachers pointed out that working parents would not be able to attend. Blanchfield responded that "it did not matter what time the meeting was held since nobody in East Winston works anyway." J.A. 1165, 363. After certain teachers objected to this comment, Blanchfield apologized. *Id.* On another occasion, Blanchfield allegedly used the term "CP time, or colored people's time." J.A. 1402. Martin acknowledged that "there were some problematic situations [at Lewisville] in terms of racial perceptions," J.A. 76, and that "minority parents perceive Lewisville and Brenda Blanchfield negatively," J.A. 77. Daisy Chambers, an assistant superintendent who knew both Blanchfield and Love-Lane, recommended that Love- Lane not be assigned to Lewisville. Because Blanchfield and Love-Lane had different approaches to administration, Chambers believed that they would have difficulty "work[ing] together as a team." J.A. 607. Despite the concerns expressed by Chambers and Love-Lane, Martin held to his decision, and Love-Lane was transferred to Lewisville. Love-Lane accepted the new assignment, telling Martin that she would do her best to work with Blanchfield. Love-Lane, however, asked Martin to "monitor the situation," and he promised that he would. J.A. 1201.

Love-Lane started her job as assistant principal at Lewisville Elementary School in November 1995. The school is located in the suburbs and to a large extent serves middle to upper class white children from the surrounding area. However, a number of African American children from poor or working class families in East Winston are bused to Lewisville. During Love-Lane's three years at the school, about sixty-five percent of the students were white and about

thirty-five percent were African American. Love-Lane describes the Lewisville staff as "overwhelmingly white." Out of a staff of approximately 100, the number of African American teachers ranged from two to six during Love-Lane's time at the school. J.A. 1201.

Soon after Love-Lane began working at Lewisville, she discovered disciplinary practices at the school that placed many African American students at a disadvantage. Her main concern was the "time-out room," where teachers could send students who were misbehaving. Love-Lane had several objections to the time-out room. First, a disproportionate number of African American students, particularly African American boys, were sent to the time-out room. Some teachers called on white girls to escort African American boys to the room, a practice that was no doubt humiliating to the boys. J.A. 1207. Second, the time-out room served to relieve individual teachers of responsibility for handling discipline problems in the classroom. A student could be referred to the room for any infraction without the knowledge or approval of the principal or assistant principal. In other words, there were no safeguards to prevent a teacher from making excessive use of the time-out room. Love-Lane noticed that students were often sent to the room "for the most minor of infractions." J.A. 1205. At times there were so many children crowded into the room that there was "standing room only." J.A. 1220. Third, the students who were sent to the time-out room were not given adequate instruction. The staff person who ran the time-out room was not a certified teacher, and she had no training in how to deal with problem students. The problem of inadequate instruction was magnified because "many of the same students [were] referred to the time-out room repeatedly, for long periods of time by many of the same teachers." J.A. 1207. According to Love-Lane, the time-out room "denied quality instruction to many of the children who needed it most--the African-American children who were being bused from

East Winston." J.A. 1207. Love-Lane was especially concerned about fifth grade students because several of their teachers were strong advocates of the time-out room and used it continually. J.A. 1204, 1405. Some fifth graders were sent routinely to the time-out room at 8:45 a.m., just as classes began for the day. J.A. 1220. Love-Lane feared that the room was used, especially by some fifth grade teachers, simply to "warehouse" African American boys. J.A. 1203, 1204-07, 1212-14.

Love-Lane's assessment that the time-out room was being used in a racially discriminatory way is indicative of larger concerns that she and others had about race relations at Lewisville. Love-Lane observed that disciplinary measures in the classrooms "seemed directed toward the black students for the most part," both in terms of frequency and severity of punishment. J.A. 1214. Another Lewisville staff member recounted how one teacher "would have black males sit at desks facing the corner of [the] room with their faces to the wall." J.A. 1227. What Love-Lane saw as discriminatory discipline extended beyond the classroom. Once, Love-Lane saw a teaching assistant "with her foot in a little black boy's back as he lay on the hall floor crying." J.A. 1207. On another occasion, Love-Lane had a substantial disagreement with several fifth grade teachers who were excluding a number of African American and poorer white students from the class trip to Washington, D.C., and Williamsburg, Virginia. There were no established criteria for excluding a student, and the teachers were using minor infractions to justify exclusion. Love-Lane brought the problem to the attention of Blanchfield, who refused to intervene. As a result, "approximately full classes of students were left at the school, most of whom were African-American and poor students." J.A. 1214.

Love-Lane also believed that a number of staff members at Lewisville were insensitive to African American culture.

J.A. 1202. One day, for example, an African American girl went home in tears after her fifth-grade teacher barred her from class "because, in [the teacher's] terms, the student's 'jelly curl or what ya'll call it, stinks.' " J.A. 1213. *See also* J.A. 1226. The director of the Board's African-American Infusion Project observed that many teachers at Lewisville were not receptive to diversity training workshops, and the director was especially "concerned that Mrs. Blanchfield did not seem to address the problem of the teachers' insensitivity or lack of interest" in this area. J.A. 360. Parents of African American children expressed similar concerns about "the racial problems at Lewisville," J.A. 389, and about "teachers who seemed to have no awareness or sensitivity to racial issues." J.A. 393.

Despite her concerns about the time-out room and other disciplinary practices that appeared to be discriminatory, Love-Lane "was careful not to make any quick judgments" during her first year at Lewisville (1995-96). J.A. 1203. Instead of "question[ing] how things were done," she concentrated on "getting acquainted with the staff, teachers and students," J.A. 1203, and in trying to establish good relationships with her colleagues, J.A. 127. By the end of her first year, she felt accepted by her Lewisville colleagues, and she received a superior evaluation from Blanchfield, the principal.

As her second year (1996-97) at Lewisville got under way, Love-Lane felt that she had to discuss with Blanchfield her concerns about the discriminatory disciplinary practices at Lewisville. Love-Lane understood her professional charge from Martin to be "raising the awareness or consciousness of [Lewisville] teachers" about minority issues, and she understood that she and Blanchfield were to work together on this goal. J.A. 127. But every time that Love-Lane tried to discuss her concerns about disciplinary practices, including use of the time-out room, with Blanchfield, she was either rebuffed or ignored. J.A. 1206, 1208. After Blanchfield

refused to address the subject of discriminatory discipline, Love-Lane began voicing her concerns at faculty meetings and at School Improvement Team (SIT) meetings. J.A. 363-64, 388. The SIT was an advisory group of administrators, teachers, and parents, whose goal was to "make suggestions designed to improve education at Lewisville for all students." J.A. 387. Love-Lane and Blanchfield both attended SIT meetings. *Id.* One parent-member of the SIT said that in these meetings Love-Lane often raised issues about disciplinary practices that placed African American and poorer students at a disadvantage. According to this parent, "it would be evident from Ms. Blanchfield's body language that she resented Ms. Love-Lane bringing up these issues ... [though] Ms. Love-Lane always acted respectfully toward Ms. Blanchfield." J.A. 388. Some of the teachers, especially from the fifth grade, also resented the fact that Love-Lane was raising questions about disciplinary practices at Lewisville. J.A. 364, 415. After Love-Lane spoke out at one faculty meeting, a few teachers told Blanchfield that they were offended by Love-Lane's disrespectful tone and by her characterization of the teachers' use of the time-out room as "unprofessional." J.A. 955. Love-Lane denies that she was disrespectful, and a number of teachers and parents who heard Love-Lane talk about the disciplinary practices described her tone and manner as professional and respectful. J.A. 354, 387-88, 394. Nevertheless, as one teacher's assistant put it, "[i]t was common knowledge throughout the school that some of the fifth grade teachers had banded together against Ms. Love-Lane." J.A. 398.

During her second year at Lewisville, Love-Lane also expressed her concerns about race discrimination in discipline directly to Superintendent Martin. J.A. 1208, 1210-11. She told him that "African-American parents were not happy with how their children were being treated at Lewisville." J.A. 1407. According to Love-Lane, "Martin indicated little

concern for the racial issues I was raising; he seemed more concerned that I not make waves--that I avoid any actions which might cause conflict." J.A. 1210. Martin said that he discounted Love-Lane's concerns that minority children at Lewisville were being "denied equal access to education" because he did not agree with her assessment of the situation. J.A. 1365.

At the end of Love-Lane's second year at Lewisville, she received her annual evaluation from Blanchfield. Although she received excellent ratings on most of her work, she received for the first time lower ratings on her communication skills. Blanchfield told Love-Lane that 85 percent of the teachers found her intimidating and that they objected to her direct style of communication. J.A. 1210. Blanchfield refused, however, to provide Love-Lane with any details about these complaints. *Id.* Blanchfield did tell Love-Lane that she had concerns about Love-Lane's inability to accept feedback and her "blatant actions of disrespect toward" Blanchfield. J.A. 868-69. Blanchfield recommended that Love-Lane receive only a two-year contract as an assistant principal. J.A. 869. (Administrators were given contracts of up to four years.) Blanchfield informed Love-Lane that she had "many strengths which if coupled with improvements in working relationships and respect for those [Love- Lane is] assigned to work with would make [her] very effective and efficient in a leadership role." *Id.* Blanchfield then advised Martin that she no longer wanted to work with Love-Lane. Love-Lane, for her part, requested a transfer. J.A. 969, 1211. At the end of this second year Love-Lane again confronted Martin about "the treatment of African-American children [at Lewisville], particularly with reference to the time-out room." J.A. 1211. According to Love-Lane, "Martin listened but made no commitment to take any action." *Id.* Love-Lane received no response to her transfer request. *Id.*

On June 11, 1997, as her second year at Lewisville was ending, Love-Lane was involved in an altercation with a teacher. Each woman alleged that the other called her names and used profanity. Blanchfield issued a letter of reprimand to both women, prompting Love-Lane to file a grievance. J.A. 1069. Love-Lane filed her employee grievance form on August 15, 1997, claiming that she was being discriminated against because of her race. J.A. 1017. She alleged that the letter of reprimand was based on Blanchfield's biased investigation. *Id.* Love-Lane's grievance prompted Superintendent Martin to assign a paralegal in his office to conduct an investigation into the altercation. J.A. 1029. The investigator reviewed the materials that had been compiled by Blanchfield in her investigation of the altercation, and he interviewed witnesses identified by both Blanchfield and Love-Lane. The investigator concluded that both Love- Lane and the teacher had used profanity and that Blanchfield's reprimands were justified. J.A. 1029-31. Martin received a written and oral report from the investigator in early September 1997. *Id.* Based on the report, Martin sent Love-Lane a letter on September 23, 1997, warning her that "[a]nother such outburst" would result in a recommendation for her dismissal. J.A. 975. Martin did not personally investigate Love-Lane's discrimination claim because, according to him, "race had nothing to do with [the problems between Love-Lane and Blanchfield]. It was clearly personality conflict. Race had nothing to do with it." J.A. 1401.

In October 1997, at the beginning of Love-Lane's third year at Lewisville, Martin met with her and Blanchfield. In a letter that Martin handed to both women, he strongly encouraged them to work together in a spirit of cooperation; otherwise, he said, changes would have to be made at Lewisville. J.A. 969. Martin made several points in his letter. He noted that "neither [Blanchfield nor Love-Lane] has much respect or trust in the

other" and that he had never "experienced a conflict between two school administrators as acrimonious and divisive." J.A. 976. Martin said, however, that "there is no ... basis to believe that the conflict between these two administrators is based upon the race of the individuals." J.A. 978. Martin did believe that the bad working relationship between the two women "adversely affected the effectiveness of the administration of the school," J.A. 977, but he was careful to note that the welfare and safety of the students were not at risk, J.A. 978. Martin's letter had specific warnings for Love-Lane. She was told that if she disagreed with any of Blanchfield's policies, she should state her disagreements to Blanchfield in private, not in public to the faculty, students, or parents. J.A. 979. Finally, Love-Lane was warned that she would have no future as a school administrator unless she was "able and willing to respect the authority of the principal and to rebuild that degree of trust that is necessary for her to function effectively as a school administrator." J.A. 980. Love-Lane responded to Martin's letter by telling him once again that "it was the students [she] was concerned about," especially the African American students who "were being treated improperly in the time-out room and otherwise." J.A. 1212. Martin, who admits that Love-Lane raised these concerns a number of times between the spring and fall of 1997, J.A. 968, 1306, told Love-Lane that it was not her "job to worry about the children ... but that it was [her] job to please [her] principal," J.A. 1212. Martin ignored Love-Lane's expressions of concern about the discriminatory disciplinary practices and told her point blank that he did not want to "hear from [her] or Lewisville that year." *Id.* *See also* J.A. 1306.

Notwithstanding Martin's warnings, Love-Lane continued to voice her concerns about race discrimination at Lewisville during her third year (1997- 98) there. As a result, her relationship with Blanchfield deteriorated even further. In January 1998 the fifth grade teachers complained about Love-

Lane to Blanchfield and requested that another administrator be assigned to the fifth grade team for the rest of the year. J.A. 959-61. Specifically, the teachers told Blanchfield that they were having difficulty in communicating with Love-Lane and that she was not treating them as professionals. *Id.* In the spring of 1998 the fifth grade teachers again complained, this time to Martin, about their difficulties in working with Love-Lane. J.A. 1155-56. According to Martin, these teachers regarded Love-Lane as overbearing, intimidating, and unsupportive of their disciplinary practices. J.A. 1328, 1372. On May 7, 1998, Blanchfield completed a draft evaluation of Love-Lane's performance for her third year at Lewisville. Blanchfield rated Love-Lane "below standard" and "unsatisfactory" in three areas that related primarily to communication skills and efforts. Love-Lane received ratings of "at standard" or above in eight of eleven evaluation categories, including two ratings of "well above standard." J.A. 292-96. Martin and Amanda Bell (an assistant superintendent) reviewed the evaluation before it was given to Love-Lane. J.A. 290. On May 11, 1998, Blanchfield sent Love-Lane a memo, with copies to Martin and Bell, stating that she (Blanchfield) considered Love-Lane's "continued vocal opposition to our implementation of the Time-Out Room as blatant disrespect for me." J.A. 1268. On June 2 Martin sent Love-Lane a memo informing her that she would "be assigned to a different school, working in a nonadministrative position for the 1998-99 school year." J.A. 481. Love-Lane was ultimately assigned to teach high school classes at North Forsyth High School. J.A. 1216. Love-Lane's pay level was maintained until the end of her administrative contract. Martin's memo informed Love-Lane of Blanchfield's claim "that [Love-Lane] put forth minimal efforts to carry out the role, responsibilities, and functions of an assistant principal," which resulted in her lower evaluation for the 1997-98 school year. J.A. 481. Martin claimed that Love-Lane had faile d to respond positively to his October 1997 recommendations and

that she lacked the "ability or desire to rebuild respect and trust" with Blanchfield and other staff members at Lewisville. *Id.* Martin concluded that Love-Lane's "unwillingness to reestablish working relationships with the principal and staff" had convinced him that Love-Lane did "not have a future as an administrator" in the school system. *Id.* Martin says that he "was not aware of, and did not consider" that Love-Lane "had engaged in any First Amendment activities." J.A. 973. Blanchfield, too, was transferred out of Lewisville and was placed at the school system's central office for the 1998-99 year. J.A. 290.

Love-Lane filed a grievance with the Board challenging Martin's decision to reassign her. A panel of three Board members held a hearing in Love-Lane's case on August 4, 1998, and the following two issues were considered:

> 1. Whether or not the recommendation of the Superintendent [Martin] to nonrenew the two-year administrative contract of Ms. Decoma Love-Lane is arbitrary, capricious, or for personal or political reasons.
> 2. Whether or not the Superintendent [Martin] has the authority to assign Ms. Love-Lane to a teaching position for the remaining year of her administrator's contract.

J.A. 991. The three-member Board panel received documents from both sides, including a "grievance book" that Love-Lane had compiled. J.A. 273, 304. The panel also heard statements from Love-Lane's lawyers, Love-Lane, Martin, and Blanchfield. *Id.* The minutes of the hearing reflect that one of Love-Lane's lawyers argued to the panel that "the disagreements evidenced in the record between Ms. Blanchfield and Ms. Decoma Love-Lane were personal in nature and, therefore, the Board should not uphold" Martin's

decision. J.A. 992. Love- Lane told the panel that "her career was being sabotaged by Ms. Blanchfield" and that Blanchfield's recommendations regarding Love-Lane's future were "personal in nature." J.A. 993. Love-Lane denied that her performance had been unsatisfactory or below standard. *Id.* Martin said that the reasons stated in his June 2, 1998, memo to Love-Lane justified his decision to remove her from the assistant principal's job at Lewisville and reassign her to a teaching position. The Board panel voted 2-1 to uphold Martin's reassignment decision. The one member who dissented did so because it appeared that "Dr. Martin had already made up his mind about what he wanted to happen." J.A. 264. This member "became concerned because [she] didn't feel that [Martin] had given Ms. Love-Lane a fair shake." *Id.* Because the panel's decision was not unanimous, Love-Lane was able to appeal the issue to the full Board, which upheld the decision after reviewing the record before the panel and hearing argument from the lawyers for both sides. J.A. 273-74, 314-15. Love-Lane continues to work in her high school teaching position, but she claims to have lost any opportunity to pursue her preferred career path in school administration. J.A. 1216.

On August 28, 1998, Love-Lane filed a charge of race discrimination and retaliation against the Board and Martin with the Equal Employment Opportunity Commission (EEOC). She received a right to sue letter from the EEOC on June 30, 1999. On August 26, 1999, Love-Lane filed a complaint in federal court against the Board and Martin, alleging race discrimination, retaliation, and the denial of her rights to free speech and due process of law in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., 42 U.S.C. § 1981, 42 U.S.C. § 1983, and the North Carolina Constitution. After extensive discovery the defendants filed a motion for summary judgment, which the district court granted. The district court

concluded that Love-Lane could not establish a violation of her rights to free speech and due process of law and that she failed to make out a prima facie case of race discrimination. J.A. 644-84. Love-Lane appeals the judgment, but she does not pursue the due process claim.

II.

Love-Lane contends that the district court erred in granting summary judgment to the Board and Martin on her free speech and race discrimination claims. We review the summary judgment decision de novo. *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir.2002). Summary judgment is appropriate only when "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In reviewing the summary judgment, we view the facts in the light most favorable to Love-Lane, the nonmoving party, drawing all justifiable inferences in her favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The dissent does the opposite: it ignores the best of Love-Lane's evidence and states the facts in the light most favorable to the Board and Martin. This mistaken approach, of course, allows the dissent to say that this case involves nothing more than a superintendent's "decision to separate ... two administrators embroiled in a personality conflict." *Post* at 790. This case involves much more than a personality conflict when the facts are viewed, as they must be, in Love-Lane's favor: it involves a superintendent who demoted an assistant principal because she spoke out against race discrimination in discipline at a public school.

III.

A.

We turn first to the district court's rejection of Love-Lane's

claim, asserted under 42 U.S.C. § 1983, that the Board and Martin violated her right to free speech guaranteed by the First Amendment to the Constitution of the United States. The government may not retaliate against a public employee who exercises her First Amendment right to speak out on a matter of public concern. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 573, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). This means, for example, that "[a] state may not dismiss a public school teacher because of the teacher's exercise of speech protected by the First Amendment." *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 155-56 (4th Cir.1992). The First Amendment does not protect all speech by public employees. "Personal grievances, complaints about conditions of employment, or expressions about other matters of personal interest" fall outside the First Amendment because they are not matters of public concern. *Id.* at 156. Even speech on a matter of public concern does not automatically qualify for First Amendment protection: the speaker's interest in free expression is "tempered by the government's interest in governmental effectiveness, efficiency, order, and the avoidance of disruption." *McVey v. Stacy,* 157 F.3d 271, 277 (4th Cir.1998).

Retaliatory employment action violates a public employee's right to free speech under the following conditions. First, the speech must relate to a matter of public concern. *Id.* Second, the "employee's interest in First Amendment expression must outweigh the employer's interest in efficient operation of the workplace." *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (4th Cir.2000) (internal quotation marks omitted) (citing *Pickering,* 391 U.S. at 568, 88 S.Ct. 1731). (This part of the inquiry is known as the *Pickering* balancing test.) Third, there must be a causal relationship between the protected speech and the retaliatory employment action; specifically, "the protected speech [must be] a 'substantial factor' in the decision to take the allegedly

retaliatory action." *Id.* (internal quotation marks and citation omitted). The first two elements involve questions of law. The third element, causation, can be decided on "summary judgment only in those instances when there are no causal facts in dispute." *Id.*

1.

The first question is whether Love-Lane's speech was about a matter of public concern. "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." *Urofsky v. Gilmore,* 216 F.3d 401, 406-07 (4th Cir.2000). The Supreme Court has made it clear that statements about a "[s]chool [d]istrict's allegedly racially discriminatory policies involve[ ] a matter of public concern." *Connick v. Myers,* 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (citing *Givhan v. W. Line Consol. Sch. Dist.,* 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979)). We, too, have repeatedly recognized that a public employee's speech about racially discriminatory practices, particularly in public schools, involves a matter of public concern. *See Seemuller v. Fairfax County Sch. Bd.,* 878 F.2d 1578, 1582 (4th Cir.1989); *Arvinger v. Mayor & City Council of Baltimore,* 862 F.2d 75, 78 (4th Cir.1988); *cf. Piver v. Pender County Bd. of Educ.,* 835 F.2d 1076, 1079 (4th Cir.1987); *English v. Powell,* 592 F.2d 727, 732 n. 5 (4th Cir.1979). In analyzing whether speech involves a matter of public concern, we consider "the content, form, and context of [the] given statement[s], as revealed by the whole record." *Connick,* 461 U.S. at 147-48, 103 S.Ct. 1684. In this case, content and context are key. The content or subject matter of Love-Lane's speech dealt with disciplinary practices at Lewisville that discriminated against African American children. According to Love-Lane, African American children were disciplined more severely than other students. For example, they were sent more often to the time-out room,

where they received no meaningful instruction. This speech did not relate to a private issue between Love-Lane and her employer. Rather, the summary judgment record demonstrates that it dealt with an issue of major concern to many in the Lewisville school community, including teachers, parents, and students.

The context of Love-Lane's speech is also important. Race discrimination in discipline was a topic Love-Lane spoke up about at SIT meetings, at Lewisville faculty meetings, and at private meetings with Blanchfield or Martin. The meetings of the SIT (the advisory group of teachers, administrators, and parents) often focused on how to improve the education of Lewisville's "at-risk kids," many of whom were African American. J.A. 387-88. Thus, at SIT meetings when Love-Lane talked about race discrimination in discipline, she was raising exactly the sort of issue that was meant to be discussed at such meetings--meetings that were attended by parent representatives from the community. *Cf. Piver,* 835 F.2d at 1081 (noting that the public importance of a teacher's speech on the subject of a principal's tenure was demonstrated when "part of the speech took place at a public meeting called for the very purpose of soliciting opinions" on the tenure question). The fact that Love-Lane at times voiced her complaints about discriminatory discipline in faculty meetings and in private meetings with Blanchfield or Martin does not forestall a conclusion that her speech involved a matter of public concern. In the end, Love-Lane's "right to protest racial discrimination--*a matter inherently of public concern*--is not forfeited [because she sometimes chose] a private forum." *Connick,* 461 U.S. at 148 n. 8, 103 S.Ct. 1684 (emphasis added). *See* also Cromer v. Brown, 88 F.3d 1315, 1326 (4th Cir.1996). In sum, the content and context of Love-Lane's speech establish that she was speaking about a matter of public concern.

The dissent claims that "Love-Lane's *speech on* ... discriminatory practices was but a small part of her tenure at Lewisville." *Post* at 795. It thus suggests that Love-Lane did not speak out often enough about discriminatory discipline to qualify as a citizen speaking on a matter of public concern. *See post* at 794. This simply ignores *Love-Lane's* evidence in the summary judgment record. Time and again, that evidence shows, Love-Lane voiced her opposition to the time-out room and other disciplinary practices that discriminated against African American students. J.A. 385, 387-88, 415, 1168. She pointed out that African American students were disciplined in ways that often excluded them from regular class participation and from participation in activities such as class trips. J.A. 1203-07. Love-Lane has proffered evidence that she was persistent in speaking up about these problems, particularly the time-out room, in discussions with Blanchfield and Superintendent Martin and in meetings of the faculty and the SIT. One parent-member of the SIT summed up the focus and persistence of Love-Lane's speech in this way:

> Ms. Love-Lane informed us [in the SIT meetings] that there was an overwhelming number of African-American students that were in the time-out room, that were sent to the office, and that were suspended. Ms. Love-Lane attempted to address the reasons for this situation time and again. Ms. Love- Lane spoke out about the fact that some of the teachers were arbitrary in their discipline, and did not know how to control African-American children. She expressed concerns about some teachers' lack of understanding of cultural differences. She wanted us to try to work towards resolving the problem.

J.A. 394 (emphasis added). The record, when read in the light most favorable to Love-Lane, leaves no doubt that she spoke out regularly about discriminatory discipline, a matter of public concern.

2.

Next, we consider whether Love-Lane's free speech interest out-weighs the interest of the Board and the Superintendent in the efficient operation of the school system. *See Pickering,* 391 U.S. at 568, 88 S.Ct. 1731. The interest of the community is also weighed in this evaluation. *Cromer,* 88 F.3d at 1326. The government employer must make a stronger showing of the potential for inefficiency or disruption when the employee's speech involves a "more substantial[ ]" matter of public concern. *Connick,* 461 U.S. at 152, 103 S.Ct. 1684. *See also Hall v. Marion Sch. Dist. No. 2,* 31 F.3d 183, 195 (4th Cir.1994) ("When an employee's speech substantially involves matters of public concern . . . . the state must make a stronger showing of disruption in order to prevail."). An assistant principal's detailed claim of race discrimination against African American students in a public school involves a serious and substantial issue of public concern. The summary judgment record demonstrates that this issue was of special importance to parents of African American children at Lewisville and to many in the larger community. J.A. 75- 76, 387-88.

Because of the especially strong interest of the speaker (Love-Lane) and the community in the subject of Love-Lane's speech, the Board and Martin bear a heavier burden in attempting to show that their efficiency concerns outweigh Love-Lane's free speech interests. Factors that we take into account in balancing these interests include whether the employee's speech (1) impairs the ability of supervisors to mete out discipline, (2) impairs harmony among co- workers, (3) damages close working relationships, (4) impedes the performance of the public employee's duties, (5) interferes with the operation of the agency, (6) conflicts with the responsibilities of the employee within the agency, and (7) is communicated to the public or to co-workers in private.

McVey, 157 F.3d at 278 (citing *Rankin v. McPherson,* 483 U.S. 378, 388-91, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987)). In this case the Board and Martin argue that Love-Lane's speech adversely affected school administration and resulted in poor working relationships between Love-Lane and other teachers and between Love-Lane and Blanchfield.

In considering the employer's efficiency concerns, we take into account the disruptions or inefficiencies caused by the content of the speech for which First Amendment protection is sought. *Givhan,* 439 U.S. at 415 n. 4, 99 S.Ct. 693. Of course, the speech "will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose." "*Rankin,* 483 U.S. at 388, 107 S.Ct. 2891. The defendants' proffered evidence reveals that certain teachers (mostly from the fifth grade) and administrators regarded Love-Lane as abrasive and confrontational. J.A. 1002-03, 1155-56, 1210. A few fifth-grade teachers complained on one occasion that Love-Lane called their use of the time-out room "unprofessional." And Blanchfield said that she took Love-Lane's vocal opposition to the time-out room as a sign of "blatant disrespect." It appears that the teachers and administrators who took offense at Love-Lane's manner or tone also took offense at the content of her speech opposing race discrimination in discipline. (The dissent contends that this last statement "finds no support in the record," *post* at 794, but it does. For example, one fifth-grade teacher who opposed the time-out room "heard [other fifth-grade] teachers on more than one occasion express resentment toward Ms. Love-Lane for questioning discipline practices" such as their use of the time-out room. J.A. at 364.)

For her part, Love-Lane states that she voiced her concerns about race discrimination in a sincere and respectful way. J.A. 1203-04. Love-Lane's own statements must be credited for purposes of summary judgment, and contrary to what the dissent suggests, *see post* at 795, her position has much support in the record. A number of Love-Lane's fellow staff members at Lewisville, as well as parent-members of the SIT, confirm that her speech and manner were professional and reassuring, not disruptive or disrespectful. *See, e.g.*, J.A. 354 (assistant principal stating that Love-Lane performed her duties "in a professional manner."); J.A. 384 (teacher stating that Love-Lane was "warm, passionate and professional" and that "[c]hildren, parents and teachers felt comfortable talking with [her]."); J.A. 1166 (teacher stating that Love-Lane was "articulate, genuine, caring, and accessible" in her role as assistant principal); J.A. 414 (teacher stating that Love-Lane "was pleasant to work with and I respected her."); J.A. 397 (teacher's assistant stating that Love- Lane was "an excellent assistant principal" who "had the children's well-being at heart."); J.A. 349 (parent-member of the SIT stating that "Love-Lane was always respectful and professional" in voicing her objections to the time-out room and other disciplinary practices that worked against African-American students). Superintendent Martin himself acknowledged that the "welfare of the students" was not "at risk as a result of any action or in action [sic] by" Love-Lane. J.A. 978. We have thus analyzed the effects of both the content and manner of Love-Lane's speech, and we have done it in a way that is well within the parameters of the cases cited by the dissent. *See e.g., Leary v. Daeschner*, 228 F.3d 729, 738 (6th Cir.2000) (concluding that even though plaintiff-teachers' speech criticizing their school's handling of student discipline "was often conducted in a disrespectful manner," the speech was "of sufficient public importance to outweigh the [school board's] interest in limiting that speech.").

In sum, the evidence, especially when viewed in Love-Lane's favor, shows that her speech did not affect the ability of administrators and teachers at Lewisville to deliver their educational services; nor did her speech diminish the quality of education being provided. But even if Love-Lane's speech--exposing and opposing race discrimination--caused some disharmony at the Lewisville school, we must remember that her speech dealt with a substantial issue of public concern that was of special interest to the larger Lewisville community. In all events, the interests of Love-Lane and the community in her speech are sufficiently substantial to outweigh the efficiency concerns expressed by the defendants.

3.

Last, we consider whether Love-Lane's protected speech was a substantial factor in the decision to transfer her from the administrative position of assistant principal to a high school teaching position. If the causal facts about the reassignment are in dispute, summary judgment is not appropriate. *Goldstein,* 218 F.3d at 352. We note parenthetically that Love-Lane's transfer or reassignment, which was a demotion in duties and responsibilities, qualifies as an adverse employment action for purposes of her free speech claim. *See DiMeglio v. Haines,* 45 F.3d 790, 806-07 (4th Cir.1995) (citing *Rutan v. Republican Party of Ill.,* 497 U.S. 62, 75-76, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)); *Piver,* 835 F.2d at 1078 (assuming that teacher's reassignment to a school located forty miles away would constitute retaliatory action).

Love-Lane must proffer facts to demonstrate that her protected speech was a substantial factor in the decision to remove her from the job of assistant principal at Lewisville and reassign her to a teaching position. On this point we review the record to determine whether a reasonable jury could conclude that Love-Lane's reassignment was "substantially

motivated by [her] protected speech; if a reasonable jury could reach this conclusion, then we must remand the case for trial." *Goldstein,* 218 F.3d at 357. The defendants offer several grounds, all allegedly independent of the protected speech, to support their decision to reassign Love-Lane to a teaching position. Specifically, they contend that Love-Lane (1) displayed an unwillingness "to accept constructive criticism" from her supervisors, (2) "refused to acknowledge any responsibility or need to develop better communication skills or better working relationships," (3) "put forth [only] minimal efforts to carry out the role, responsibilities, and functions of an assistant principal," and (4) demonstrated an inability or lack of desire "to rebuild respect and trust [which] adversely affected the administration of staff and Lewisville School." J.A. 481. The Board and Superintendent Martin claim that none of Love-Lane's evidence shows that her protected speech was a factor in their respective decisions. Martin claims specifically that he did not consider Love-Lane's protected speech at all when he made the decision to reassign her to a teaching position. The defendants (and the dissent), however, ignore much of Love- Lane's side of the summary judgment record. Our review of the record reveals that Love-Lane has proffered sufficient circumstantial evidence to establish that her protected speech (her vocal opposition to the discriminatory discipline practices at Lewisville) was a substantial factor in the decision to demote her to a teacher's position. *Cf. Peters v. Jenney,* 327 F.3d 307, 323 (4th Cir.2003) (vacating grant of summary judgment to defendant where the plaintiff presented limited, but sufficient, evidence of a causal connection between her speech and the nonrenewal of her contract); *Pike v. Osborne,* 301 F.3d 182, 185 (4th Cir.2002) (concluding that the plaintiff's evidence of the causal connection between speech and retaliation was sufficient even though it was "thin and circumstantial"). We will recount this evidence.

First, as Love-Lane's speech became increasingly more critical of race discrimination in discipline at Lewisville, her performance evaluations from Blanchfield, the principal, became increasingly more negative. At the end of Love-Lane's first year as assistant principal at Lewisville, before she expressed concerns about the treatment of minority students, she received excellent evaluations from Blanchfield. At the end of Love-Lane's second year, after she had spoken out about discrimination–first in private meetings with Blanchfield, where she was rebuffed, and later at faculty meetings and SIT meetings--Blanchfield gave her lowered evaluations. During her third year, as Love-Lane continued to raise concerns about race discrimination at Lewisville, her relationship with Blanchfield deteriorated even further. Near the end of the third year Blanchfield sent Love-Lane a memo, with a copy to Martin, saying that she (Blanchfield) considered Love-Lane's "continued vocal opposition to our implementation of the Time-Out Room as blatant disrespect for me." J.A. 1268. Blanchfield sent this memo at about the same time that she completed her last evaluation of Love-Lane which rated her as "below standard" or "unsatisfactory" in three areas. Martin, of course, relied on Blanchfield's evaluations in making the decision to reassign Love-Lane.

Second, Martin's own assessment of Love-Lane grew more negative as she continued to speak out about discrimination. Indeed, Martin attempted to discourage or suppress her speech. Love-Lane brought the race discrimination issue to Martin's attention several times. Rather than face up to the issue, however, Martin "seemed more concerned that [Love-Lane] not make waves." Martin actually instructed Love-Lane to "avoid any actions which might cause conflict." J.A. 1210. Love-Lane's job, Martin told her, was not to worry about the children but to please the principal, Blanchfield. Martin admitted that he did not conduct any investigation into Love-Lane's allegations about racially discriminatory practices at

Lewisville. J.A. 1364-65, 1413-15. And Martin further admitted that when Love-Lane continued to confront him about her concerns, he "told her that all of Lewisville's business needs to stay out of my office." J.A. 1306. Finally, Love-Lane told Martin that Blanchfield was giving her lower evaluations because she had spoken out on racial issues. *See* J.A. 661. Martin nevertheless decided that Love-Lane should be removed from her administrative position at Lewisville and transferred to a high school teaching position.

A rational jury could find from these facts that Blanchfield resented Love- Lane's vocal opposition to race discrimination and that she punished Love-Lane for this speech by giving her lower evaluations. A jury could find that Martin, who endorsed Blanchfield's evaluations and reassigned Love-Lane in part because of them, was aware of Love-Lane's speech and Blanchfield's opposition to it. A jury could find that Martin was unwilling to address Love-Lane's concerns about race discrimination at Lewisville and that he even attempted to prevent Love-Lane from speaking out. A jury could find that Martin became increasingly aggravated as Love-Lane continued to bring up the subject of race discrimination at Lewisville. Finally, a jury could conclude that Love-Lane's speech was a substantial factor in the decision to remove her from her job at Lewisville and demote her.

The dissent claims that Martin demoted Love-Lane because of her personality conflict with Blanchfield and her "tone and demeanor." *Post* at 797. Love- Lane's evidence does not allow this conclusion at the summary judgment stage. At the three schools where Love-Lane previously served as assistant principal, she had excellent relationships with her principals. These principals complimented her for her strong skills in communicating and consistently recommended her for promotion. J.A. 1199-2000. Superintendent Martin himself considered Love-Lane to be "an outgoing, people oriented

administrator." J.A. 966. Martin considered transferring Love-Lane to Lewisville because Blanchfield had allowed serious racial tensions to develop there. Martin knew that Blanchfield and Love-Lane had different approaches to school administration. Nevertheless, Martin sent Love-Lane to Lewisville as an antidote to the racial tensions and to serve as a role model for African American students. J.A. 966. As it turned out, Love-Lane and Blanchfield did not get along; but when the facts are viewed in Love-Lane's favor, it becomes clear that this case cannot be brushed aside as a "simple personality dispute," as the dissent attempts to do. *See post* at 791. Once Love-Lane went to Lewisville and assessed the situation, she realized that discriminatory discipline was a major problem. When she began to speak out about the discrimination, she ran into trouble with Martin. She raised her concerns with him, and he told her that he did not want to hear about Lewisville. When Love- Lane persisted in speaking out, Martin demoted her. Love-Lane thus proffers sufficient evidence to raise a jury question about whether her speech was a substantial factor in the decision to demote her.

4.

We conclude that Love-Lane, who was protesting race discrimination in a public school, was speaking out on a matter of public concern. Love-Lane's and the community's interests in her speech outweigh the efficiency concerns of her employer. And, when we view the evidence in the light most favorable to Love- Lane, we conclude that there is a genuine issue of material fact as to whether Love-Lane's speech was a substantial factor in the decision to demote her. The dissent contends that we have reached this conclusion by ignoring defense evidence and by "accord[ing] little respect to the record." *Post* at 797. *See also post* at 790-792. We have not ignored the evidence proffered by the defense. *See supra* at 771-774, 778-779, 780-781. And we have respected the

record because the *entire record* has been our guide. A review of the entire record reveals a factual dispute about the role of Love-Lane's speech in her demotion that must be resolved by a jury. In sum, Love-Lane has at this stage established the elements of a claim that she was retaliated against for exercising her constitutional right to free speech.

B.

Because Love-Lane presents a valid claim for violation of her First Amendment right to free speech, we must decide whether the defendants, the Board and Superintendent Martin, are subject to suit under 42 U.S.C. § 1983. We consider in turn the potential liability of the Board and Martin (the latter is sued in both his official and personal capacities).

1.

To hold a municipality (a local government entity) liable for a constitutional violation under § 1983, the plaintiff must show that the execution of a policy or custom of the municipality caused the violation. *Hall,* 31 F.3d at 195. "[M]unicipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. City of Cincinnati,* 475 U.S. 469, 480, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986). To hold a municipality liable for a single decision (or violation), the decisionmaker must possess "final authority to establish municipal policy with respect to the action ordered." *Id.* at 481, 106 S.Ct. 1292. In this case the Board exercised final review authority over Martin (through the three-person panel of the Board and then the full Board) in approving his decision to demote Love-Lane to a teaching position. Only this action by the Board, which involved the exercise of its final policymaking authority, may serve as the basis for Board liability. *Id.* Thus, the Board cannot be held liable for personnel decisions over which it did

not retain final review authority; that is, it is not liable for decisions committed to Martin's discretion because there is no respondeat superior liability under § 1983. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Rather, the Board is only liable for acts that it has "officially sanctioned or ordered." *Pembaur*, 475 U.S. at 480, 106 S.Ct. 1292. This means that Love-Lane must demonstrate that the Board was aware of the constitutional violation and either participated in, or otherwise condoned, it. *See Hall*, 31 F.3d at 196. We conclude that Love-Lane has failed to demonstrate the necessary involvement on the part of the Board.

The minutes of Love-Lane's grievance hearing reveal that Love-Lane did not argue to the Board's three-person panel that either Blanchfield or Martin retaliated against her because she was exercising First Amendment rights. J.A. 278-79. Likewise, Love-Lane's "grievance book," which documented her case to the Board, did not contain anything that would have alerted the Board to her First Amendment claim. J.A. 195-96. Each member of the Board, which upheld Martin's decision after Love-Lane appealed the decision of the three-member panel, stated that his or her decision had nothing to do with Love-Lane's speech. Love-Lane thus offers no evidence that the Board punished her for, let alone was aware of, her opposition to race discrimination at Lewisville. In addition, the Board had before it legitimate grounds for upholding Martin's decision. We conclude that Love-Lane has not produced sufficient evidence to hold the Board liable under § 1983 for a violation of her First Amendment rights. *Cf. Curtis v. Okla. City Pub. Schs. Bd. of Educ.*, 147 F.3d 1200, 1216 (10th Cir.1998) (holding that there was no school board liability where the "record indicates that Plaintiff did not himself inform the Board, either at the pretermination hearing or in writing, that he believed the recommendation was retaliatory"). Accordingly, the district court properly rejected

Love-Lane's First Amendment claim against the Board.

2.

We turn next to Love-Lane's claims against Martin, brought against him in both his official and individual capacities. The district court correctly held that the § 1983 claim against Martin in his official capacity as Superintendent is essentially a claim against the Board and thus should be dismissed as duplicative. *Kentucky v. Graham,* 473 U.S. 159, 165-66, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985); *Hicks v. Halifax County Bd. of Educ.,* 93 F.Supp.2d 649, 667 (E.D.N.C.1999). As to the First Amendment claim against Martin under § 1983 in his individual capacity, Martin asserts a qualified immunity defense. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). We review de novo the district court's determination that Martin is entitled to immunity, viewing the evidence in the light most favorable to Love-Lane. *Gomez v. Atkins,* 296 F.3d 253, 260-61 (4th Cir.2002). To determine whether Martin is entitled to qualified immunity, we must (1) identify the right allegedly violated, (2) consider whether at the time of the alleged violation the right was clearly established, and (3) determine whether a reasonable person in Martin's position would have known that his actions would violate that right. *Wilson v. Layne,* 141 F.3d 111, 114-15 (4th Cir.1998). We conclude that Martin is not entitled to qualified immunity.

We have already covered the first step in Part III.A, *supra,* where we examined at length the right allegedly violated and observed that a public employee like Love-Lane has a First Amendment right to protest racially discriminatory practices at her agency without fear of retaliation. The more interesting question is the second, that is, whether the right was clearly established in 1997 and 1998 when Love-Lane was speaking out about race discrimination in discipline at Lewisville and

Martin was allegedly retaliating against her. *Pickering* itself, decided thirty years before Love-Lane's speech and demotion, made clear that the core value of the Free Speech Clause of the First Amendment--"[t]he public interest in having free and unhindered debate on matters of public importance"--is so great that a public school "teacher's exercise of [her] right to speak on issues of public importance may not furnish the basis for" an adverse employment decision against her. *Pickering*, 391 U.S. at 573, 574, 88 S.Ct. 1731. And *Givhan*, decided nearly twenty years before Love-Lane's speech, made "clear that ... statements concerning the [s]chool [d]istrict's allegedly racially discriminatory practices involved a matter of public concern." *Connick*, 461 U.S. at 146, 103 S.Ct. 1684. Thus, by 1997 it was clearly established that Love-Lane's speech about race discrimination at Lewisville involved a matter of public concern. We have said on many occasions, however, that "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' [under *Pickering*] that is subtle, difficult to apply, and not yet well-defined." *DiMeglio*, 45 F.3d at 806 (citation omitted). But we have never said "that a public employee's right to speak on matters of public concern could *never* be clearly established." *Cromer*, 88 F.3d at 1326. We did the *Pickering* balancing in part III.A, *supra*, and concluded that the subject of Love-Lane's speech was of such heightened public concern that her interest (and the community's) clearly outweighed her employer's interest in efficiency. We noted there, in fact, that Martin admitted outright that Love-Lane's speech did not jeopardize the welfare of the students at Lewisville. In light of this earlier discussion, we are persuaded that the interests to be balanced under *Pickering* weigh so heavily in Love-Lane's favor that her right to speak about race discrimination in a public school was clearly established well before 1997 and 1998. *See Cromer*, 88 F.3d at 1327-29.

The final item in the qualified immunity inquiry is whether a reasonable person in Martin's position would have known that demoting Love-Lane would have violated her right to speak out about race discrimination. We recognize that Martin, as school superintendent, has a very tough job--from handling difficult personnel matters, to satisfying parents, to providing quality education. A superintendent must therefore be accorded a great deal of leeway in managing a school system. Still, by 1997 a reasonable superintendent would surely be aware of a teacher's right to speak out in opposition to race discrimination against elementary school children. And a reasonable superintendent would also know that retaliation taken in response to such speech is a First Amendment violation, especially when the speech was not disruptive to the point of jeopardizing the welfare of the children. In short, "[a]lthough it may be difficult to delimit exactly what conduct, in the abstract, violates a public employee's first amendment rights," demoting a public school teacher who speaks out against race discrimination in her school in a manner that does not jeopardize the welfare of the students "surely falls within the ambit." *Thompson v. City of Starkville,* 901 F.2d 456, 470 (5th Cir.1990). Because case law had confirmed Love-Lane's right to speak and because the *Pickering* balancing test tips decidedly in her favor, we hold that any reasonable school superintendent in Martin's position in 1997 and 1998 would have realized that he would violate the Constitution if he, *in fact,* took adverse employment action against Love-Lane for speaking out about race discrimination at Lewisville Elementary School. We emphasize here that any liability on Martin's part hinges on Love-Lane's ability to convince a jury that her reassignment was, *in fact,* retaliation for her exercise of protected speech. We emphasize, too, that we are not holding that every time a public official takes an adverse employment action against an employee who has complained of discrimination, the official risks a trial. *See Cromer,* 88 F.3d at 1330 n. 11. "Rather, this is the infrequent

case where, after the *Pickering* balancing, the employee had the right to speak as a citizen about extensive and specific claims of racial discrimination." *Id.* Here, Love-Lane assessed the situation at Lewisville for an entire school year, determined that the time-out room and other disciplinary practices discriminated against African American children in specific ways, and complained about this to school officials, at first privately and then more publicly. Surely Martin should have known that Love-Lane could not be disciplined for her speech on such a vital subject. For all of these reasons, we reverse the district court's determination that Martin is entitled to qualified immunity with respect to Love-Lane's free speech claim.

The dissent claims that in denying qualified immunity to Superintendent Martin, we "leave[ ] [top] school administrators in a sea of indeterminancy." *Post* at 799. The majority asks, "What exactly are school administrators in Martin's shoes henceforth supposed to do?" *Post* at 799. The answer is simple. They should do the same thing they were supposed to do before today: hear out, and not retaliate against, an assistant principal (or some other mid- level administrator) who raises concerns in a professional way about race discrimination in a public school. We should remember that mid-level school administrators, such as Love-Lane, have tough jobs too, for they are on the front lines. The doctrine of qualified immunity does not strip them of clearly established constitutional protections. The superintendent who appreciates this, as most surely do, will not be hindered by today's decision.

C.

In an attempt to broaden its attack on our decision to allow Love- Lane's First Amendment claim to proceed against Superintendent Martin, the dissent in its part IV discusses the importance of maintaining discipline in our public schools.

See post at 800 ("Keeping order in our nation's schools is among our most pressing educational concerns.") This discussion actually confirms that Love-Lane was speaking out about a matter of substantial public concern when she questioned discriminatory practices in discipline at Lewisville. Indeed, Love-Lane's speech was consistent with her interest in strong discipline. She believes "that children must be taught standards of behavior and they must be required to meet them. If children do not adhere to standards, then [she] believe[s] it is a teacher's responsibility, as a trained professional, to confront the problem and deal with it, not pass it off or give up on the child." J.A. 1204. According to Love-Lane, that is where Lewisville was failing. Too many teachers were using the time-out room to warehouse at- risk children who were often consigned there for minor infractions. Once there, the children, who were mostly African-American, received no instruction. Love-Lane used her First Amendment right to expose this practice.

The dissent also says that in allowing Love-Lane's First Amendment claim to proceed, we are relying on litigation, not democratic discourse, to settle debates about disciplinary methods in public schools. *See post* at 800-801. The dissent is mistaken. We are simply recognizing that the First Amendment allows a school administrator or teacher to debate issues of discipline within the parameters of *Pickering*. Here, the jury will not decide who had the best argument in the debate about discipline at Lewisville. It will decide only whether Love-Lane was demoted because she exercised her First Amendment right to voice concerns about disciplinary practices.

In its part V the dissent contends that our decision will drive good educators to private schools or other options. As we have said, the reasonable administrator who listens to the views of his subordinates and who does not retaliate when a

troublesome issue is raised need not fear this opinion. But there is another point. The underprivileged fifth-grade student who is warehoused in a time-out room does not have the option of going to a private school or somewhere else. This student has been abandoned at the end of the road unless someone, like Love-Lane, is able to speak up for him.

IV.

Love-Lane contends that the district court erred in granting summary judgment to the Board and Martin on her claims that she was discriminated against because of her race when she was demoted. Love-Lane asserts her discrimination claims under three federal statutes, Title VII, 42 U.S.C. § 1981, and 42 U.S.C. § 1983. Love-Lane proffers a circumstantial case, and the elements required to establish such a case are the same under all three statutes. *See St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 506 n. 1, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993); *Thompson,* 312 F.3d at 649 n. 1. Specifically, the *McDonnell Douglas* framework, developed for Title VII, has been used to evaluate race discrimination claims under the three statutes. *See McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . .to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race." 42 U.S.C. § 2000e- 2(a)(1). Under the *McDonnell Douglas* proof scheme the plaintiff must first establish a prima facie case of discrimination. *See St. Mary's Honor Ctr.,* 509 U.S. at 506, 113 S.Ct. 2742. Once the plaintiff establishes her prima facie case, the defendant must respond with evidence that it acted with a legitimate, non-discriminatory reason. *See id.* at

506-07, 113 S.Ct. 2742.If the defendant makes this showing, the plaintiff must then present evidence to prove that the defendant's articulated reason was pretext for unlawful discrimination. *See id.* at 507-08, 113 S.Ct. 2742. Although the evidentiary burdens shift back and forth under the *McDonnell Douglas* framework, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). *See also Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 143, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). We conclude in this case, for the reasons set forth below, that while Love-Lane establishes a prima facie case of race discrimination, she does not proffer sufficient evidence of pretext to overcome the defendants' legitimate, non-discriminatory reason for their decision to demote her. (To the extent that the Supreme Court's recent decision in *Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003), might change the role that the *McDonnell Douglas* burden-shifting framework plays in race discrimination cases, *see Dare v. Wal-Mart Stores, Inc.,* 267 F. Supp.2d 987 (D. Minn. June 13, 2003), any change would not prevent the entry of summary judgment against Lane-Love on her race discrimination claims. As our discussion will show, Love-Lane does not "present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race ... was a motivating factor' " in her demotion. *Desert Palace,* 123 S.Ct. at 2155.)

A.

To establish her prima facie case that the defendants' decision not to renew her administrative contract and to reassign her to a teaching position was discriminatory, Love-Lane must show that (1) she is a member of a protected class, (2) she was qualified for her job and her performance was

satisfactory, (3) despite her qualifications she was removed from her assistant principal's position and reassigned to a teaching position, and (4) the assistant principal's position remained open to similarly qualified applicants after her reassignment. *See Karpel v. Inova Health Sys. Servs.*, 134 F.3d 1222, 1228 (4th Cir.1998); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir.1992)

First, Love-Lane, who is African American, is a member of a protected class. *See* 42 U.S.C. § 2000e-2(a)(1). Second, Love-Lane's evidence creates a genuine issue of fact as to whether her job performance was satisfactory at the time of her reassignment. There is no denying that by Love-Lane's third year at Lewisville, her rapport with Blanchfield, as well as with several teachers, had deteriorated substantially, and her performance evaluations reflected that. Love-Lane offers evidence, however, that she continued to perform her job at a satisfactory level despite the problems with Blanchfield and certain teachers. While the defendants offer evidence that Martin and other top administrative officials independently evaluated Love-Lane's work performance and found it to be substandard, Love-Lane's evidence indicates that she was open to feedback and constructive criticism, made efforts to get along with Blanchfield and other staff members at Lewisville, and conducted herself overall in a professional and respectful manner. In fact, even on her last performance evaluation in the late spring of 1998, Love-Lane received ratings of standard or above in eight out of eleven evaluation categories. J.A. 292-96. She received a rating of "well above standard" for her work in planning the school program, which included assisting in developing the goals and objectives of the school, providing direction to staff, and contributing to the planning of the instructional program. J.A. 292. Love-Lane has thus created a genuine issue of material fact as to whether she was performing at a satisfactory level at the time of her reassignment. Third, we assume here, as did the district court,

that Love-Lane's removal from her administrative position and reassignment to a teaching position (a demotion) constitutes an adverse employment action for purposes of Title VII. *Cf. Boone v. Goldin,* 178 F.3d 253, 256 (4th Cir.1999) (noting that Title VII liability can arise from "reassignment with significantly different responsibilities") (internal quotation marks and citation omitted). Fourth, neither side disputes that Love-Lane's assistant principal position remained open to similarly qualified applicants after her reassignment. In sum, Love-Lane can establish each of the four elements of a prima facie case of race discrimination.

B.

Because Love-Lane has established a prima facie case of race discrimination, the burden shifts to the defendants to offer a legitimate, nondiscriminatory reason for Love-Lane's reassignment. *O'Connor v. Consol. Coin Caterers Corp.,* 517 U.S. 308, 311, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996). The defendants contend that Love-Lane was reassigned because she demonstrated a complete inability to work effectively under Blanchfield and because she failed to meet the expectations laid out for her by Martin in his October 1997 memo. (Martin's memo warned Love-Lane that she had to respect the authority of her principal, register her disagreements in private, and rebuild trust. J.A. 979-80.) This explanation is sufficient to shift the burden to Love-Lane, who must show that "the legitimate reasons offered by the defendant [s] were not [their] true reasons, but were a pretext for discrimination." *Burdine,* 450 U.S. at 253, 101 S.Ct. 1089

Love-Lane fails to proffer sufficient evidence of pretext. We recognize, of course, that we held in part III that a reasonable jury could conclude that Love-Lane was retaliated against for speaking out on race issues in violation of her right to free speech. But the fact that Love-Lane has a viable free

speech claim does not automatically mean that she has a viable race discrimination claim. To reach a jury on her race discrimination claims, Love- Lane must demonstrate--apart from demonstrating that she was reassigned in retaliation for her speech on race issues--that she was reassigned "because of" her race. That, we conclude, she cannot do. Because, as we have already concluded, Love-Lane presents a genuine issue of material fact as to whether she was reassigned to a high school teaching position in retaliation for her vocal opposition to race discrimination, it follows that her evidence casts some doubt on the defendants' assertion that they had legitimate, nondiscriminatory reasons for reassigning her. But that doubt has nothing to do with Love-Lane's race. That is, none of Love-Lane's evidence that she was reassigned in retaliation for her speech suggests that she was reassigned because of her race. Simply because Love-Lane presents evidence that the defendants' justification for their adverse employment decision may be false does not mean that Love-Lane's evidence demonstrates pretext for race discrimination. "The ultimate question is whether the employer intentionally discriminated, and proof that the employer's proffered reason is unpersuasive, or even obviously contrived, does not necessarily establish that [Love-Lane's] proffered reason ... is correct." *Reeves,* 530 U.S. at 146-47, 120 S.Ct. 2097 (internal quotation marks and citation omitted). It is not enough to disbelieve the defendants here; the fact-finder must believe Love-Lane's explanation of intentional race discrimination. *Id.* at 147, 120 S.Ct. 2097. We conclude that no rational jury could do so based on the evidence in the record. Love-Lane's evidence demonstrates that racial tensions were high at Lewisville during the Blanchfield administration and that Blanchfield herself made racially insensitive comments, though none directed at Love-Lane, on at least two occasions. Love-Lane did claim that Blanchfield's reprimand following the June 1997 altercation was the result of racial bias. But an independent investigation into Love-Lane's allegations

uncovered no evidence of racial bias or animus on Blanchfield's part. Love-Lane provides no further facts from which a jury could infer a discriminatory bias or animus on the part of Blanchfield, let alone on the part of Martin or the Board, that led to Love- Lane's reassignment. Love-Lane does not even allege that the decisions of Martin or the Board were motivated by racial bias or animus. Love-Lane's evidence demonstrates only that she and Blanchfield "did not see eye-to-eye.... [T]his showing of a difference of opinion, coupled with [Love- Lane's] conclusory allegations of racism, cannot reasonably support the conclusion that [Love-Lane's reassignment] was motivated by racial animus." *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 281 (4th Cir.2000). Because, on the one side, there is substantial evidence that the defendants' articulated justifications for Love-Lane's dismissal were not pretext for race discrimination and, on the other side, there is only Love-Lane's unsupported opinion that her reassignment was based on improper discriminatory intent, we cannot conclude that she has proffered evidence of pretext sufficient to withstand the defendants' motion for summary judgment on the discrimination claims. *Cf. id.; Williams v. Cerberonics, Inc.*, 871 F.2d 452, 456 (4th Cir.1989). We therefore affirm the award of summary judgment to the defendants on the federal race discrimination claims.

V.

Finally, we turn to Love-Lane's claims against the Board and against Martin in his individual and official capacities for the violation of her right to free speech under Art. I, § 14 of the North Carolina Constitution and for race discrimination in violation of Art. I, § 19 of the North Carolina Constitution. Claims brought under the North Carolina Constitution may be asserted only against state officials acting in their official capacities. *See DeWitt v. Mecklenburg County*, 73 F.Supp.2d 589, 605-06 (W.D.N.C.1999) (citing *Corum v. Univ. of N.C.*,

330 N.C. 761, 413 S.E.2d 276, 293 (1992)). Thus, the district court correctly dismissed the state constitutional claims against Martin in his individual capacity. In addition, a plaintiff whose rights under the North Carolina Constitution have been violated may pursue an action directly under the state constitution only if there is no other remedy under state law to redress the violation. *Corum,* 413 S.E.2d at 289. In this instance, Love-Lane could have brought an action in state court under N.C. Gen.Stat. § 115C-287.1(d) seeking review of the decisions of the Board and Martin. Because Love-Lane had this remedy available under North Carolina statute, she is barred from pursuing her state constitutional claims here. *See Hughes v. Bedsole,* 48 F.3d 1376, 1383 n. 6 (4th Cir.1995); *Alt v. Parker,* 112 N.C.App. 307, 435 S.E.2d 773, 779 (1993). Accordingly, we affirm the district court's grant of summary judgment to the Board and Martin on Love-Lane's state constitutional claims.

VI.

In sum, we vacate the district court's grant of summary judgment to Martin in his individual capacity on Love-Lane's First Amendment claim under 42 U.S.C. § 1983, and we remand for further proceedings on that claim. Otherwise, we affirm the district court's grant of summary judgment to the Board and to Martin (in his official capacity only) on Love-Lane's First Amendment claim under § 1983, to the Board and Martin on Love-Lane's race discrimination claims, and to the Board and Martin on Love-Lane's claims under the North Carolina Constitution. The dissent says that our decision to allow Love-Lane's First Amendment claim to go forward will "undercut the standards that challenge students and the expectations that form the essence of education itself." *Post* at 800-801. That is a solemn pronouncement, but is not true. The standards and expectations that shape public education are not undercut when we follow precedent, as we have today, and

protect the right of a mid-level school administrator to speak out against race discrimination in her school.

WILKINSON, Circuit Judge, dissenting:

I appreciate the majority's thoughtful opinion in this case. I cannot join it, however, because it does public education too much harm. In what are surely some of the toughest jobs in America, principals and superintendents struggle to deal with troubled schools, budget deficits, and teacher shortages. Sadly, their jobs just got even harder. At issue here is nothing more than Superintendent Don Martin's decision to separate Brenda Blanchfield and DeComa Love-Lane, two administrators embroiled in a personality conflict that was diverting energy from the education of young children. To strip a superintendent of qualified immunity for this sort of personnel action is an extraordinary step. After all, the whole purpose of qualified immunity is to preserve a degree of discretion and latitude on the part of those who run our nation's public schools. Principals' and superintendents' decisions are inevitably going to disappoint at least some combination of teachers, students, parents, and the public. These beleaguered officials will now find themselves fettered by yet another constraint: the constant concern that their routine decisions will give rise to federal lawsuits.

Moreover, the majority's decision gives rise to a circuit conflict. In evaluating Martin's interest in reassigning Love-Lane, the majority considers only the substance of Love-Lane's speech, and not the disruption caused by Love-Lane's lack of tact and confrontational manner. The majority's narrow focus is out of step with decisions of the Supreme Court, of our own court, and of our sister circuits, which have consistently found that employers are not required to ignore the intemperate tone or unprofessional manner in which employees may choose to express themselves. *See* Part II.B, *infra*. Speech in an office

setting is simply different from, for example, speech in a classroom, speech in a campaign, or speech on the street. While speech in the public square may profitably be caustic and even vitriolic, that same type of speech in the workplace can rend the fabric of important relationships and interfere with the provision of valuable services to the public. The majority's holding to the contrary will work to the detriment not simply of public school systems, but of public offices throughout this circuit.

I agree with my colleagues that Love-Lane had an opportunity to make an important contribution to race relations at Lewisville. I agree further with the majority that it is important to have honest discussion on matters of race. If the record showed that Martin had reassigned Love-Lane for her speech on racial issues, I would unreservedly join the majority's opinion. Instead what the record reveals, and what the district court found, is that Love-Lane was reassigned for speaking out on a number of issues, most of which had nothing to do with race, in such an intemperate manner that it disrupted the school in which she was working. A host of teachers and administrators--female and male, African-American and Caucasian--found Love-Lane's manner harsh and uncivil. By turning a blind eye to this evidence, the majority's decision will handicap principals and superintendents who labor to create environments in which education can move forward. The ultimate cost, however, will be borne by students of all races and walks of life who will be denied the opportunity for more effective learning.

Part I of this dissent demonstrates the correctness of the district court's view that the personal relationship between Brenda Blanchfield and DeComa Love-Lane had become so contentious as to require a new management team at Lewisville Elementary. Part II explains why the majority is mistaken in concluding that Love-Lane has a First Amendment

claim for retaliatory discharge, and details the adverse effects for public schools that flow from the majority's decision. Part III describes the more troubling consequences of the majority's second blow to public school administration--that of denying even qualified immunity to principals and superintendents for their ordinary personnel decisions. Part IV discusses the implications of the majority's analysis not only for school administration, but for school discipline. Finally, Part V reflects briefly on the burdens that litigiousness is imposing on public education vis-# 27# -vis other forms of education. For as important as private and home schooling are, America will never fulfill the true promise of pluralism without a strong public education system.

A look at what transpired at Lewisville Elementary School between 1995 and 1998 makes clear that a simple personality dispute has been misleadingly cloaked in constitutional clothing. Taking the facts in the light most favorable to DeComa Love-Lane, as we must, does not mean ignoring facts unfavorable to Love-Lane that are not in dispute. Teachers and administrators, whatever their gender or race, found Love-Lane's demeanor unprofessional and contentious. By failing to consider this uncontroverted evidence, the majority converts an ordinary personnel decision into a constitutional cause of action.

In the summer of 1995, Dr. Donald Martin, Superintendent of the Winston-Salem Forsyth County Schools, named DeComa Love-Lane an assistant principal at Lewisville Elementary in Lewisville, North Carolina. During Love-Lane's three- year tenure at Lewisville, she came into conflict with both teachers and other administrators, especially Brenda Blanchfield, Lewisville's principal and Love- Lane's immediate superior. It was this breakdown in Love-Lane's working relationships, and not Love-Lane's exercise of speech protected by the First Amendment, that drove Martin's

decision to reassign her to a teaching position.

Love-Lane's difficulties at Lewisville began during the 1996-97 school year as a result of Love-Lane's opposition to the school's time-out room. Lewisville's time-out room was an intermediate step between in-class discipline and out-of-school suspension for students whose classroom behavior was disruptive. It was similar to those of many other schools, and its operation was governed by extensive procedures and overseen by a discipline committee. J.A. 269, 329-30, 744-47, 1267. The time-out room was recommended by a School Improvement Team composed of teachers and parents, and its use was approved by Blanchfield. J.A. 1266. It was also voted on and endorsed by Lewisville's entire staff at a faculty meeting in September 1996. J.A. 740, 1266. Love-Lane objected at the meeting that the room adversely impacted minority students. After the meeting several teachers complained to Blanchfield that Love-Lane had called them "unprofessional" for supporting the program. J.A. 131, 740, 823, 955, 1153. Love-Lane continued to oppose the program even after the meeting.

This dispute over use of the time-out room may have foreshadowed future conflict between Love-Lane and others at Lewisville, particularly Blanchfield. However, it was not nearly so central to the ongoing conflict as Love-Lane suggests. In fact, relations between Blanchfield and Love-Lane steadily deteriorated throughout the spring of 1997 over a host of other issues that had little to do with disciplinary practices or their impact on minority students. These issues included bus loading and unloading, a first-grade teacher's absence from the playground during recess, a kindergarten teacher's treatment of her students, a disagreement within the custodial staff, and Blanchfield's annual evaluation of Love-Lane. J.A. 858-59, 866-69, 968-69, 1252. To take but one example, Love-Lane disagreed with Blanchfield's instructions

about where Love-Lane should stand during bus loading and unloading. When Blanchfield was not present, Love-Lane ignored her instructions and did not stand where Blanchfield had requested. J.A. 187-88

Many of these administrative disagreements were aired in increasingly angry memos sent by Love-Lane and Blanchfield to each other, and copied to Superintendent Martin and Assistant Superintendent Ron Montaquila. J.A. 858- 60, 866, 868-69. Before long Montaquila was called in to mediate, and he sat in on numerous conferences at the disputants' request. These conferences typically lasted several hours, and, according to Montaquila, they usually degenerated into lengthy harangues by Love-Lane about her frustration with Blanchfield. J.A. 1002-03. Montaquila relayed to Martin both the substance of the conferences and their ineffectiveness in improving relations between Blanchfield and Love-Lane. J.A. 1004.

Martin then intervened personally beginning late in the spring of 1997, and his observations over the course of several meetings were the same as Montaquila's. J.A. 968-69. In November 1997, Amanda Bell took over for Montaquila as the assistant superintendent in charge of Lewisville. Like Montaquila and Martin, Bell had numerous lengthy meetings with Blanchfield and Love-Lane. And like Montaquila and Martin, Bell observed that Love-Lane frequently voiced disagreement with Blanchfield in a disrespectful and intemperate manner; she defied Blanchfield's instructions on even minor matters; and she did not respond favorably to Martin's constructive criticism. J.A. 289. These were the reasons that Bell, herself an African- American female, concluded that Love-Lane was having problems at Lewisville-- not because Love-Lane was speaking out on minority issues. J.A. 290.

Martin's concerns about Love-Lane's effectiveness as an administrator were amplified on the last day of school before the 1997 summer recess, when Love- Lane and a teacher, Angie Anderson, were involved in a heated confrontation in the hallway outside Love-Lane's office. Their disagreement concerned whether Anderson had questioned one of Love-Lane's decisions in regard to some teaching materials. Three separate investigations of the incident were conducted by Blanchfield; Montaquila; and David Fairall, the human resources manager for the school system. All three concluded that both Love-Lane and Anderson had used profanity and otherwise acted unprofessionally. When Love-Lane objected to these findings, Martin appointed John Siskind, a paralegal for the school district, to perform an independent investigation. J.A. 968. After conducting his own interviews, Siskind agreed with Blanchfield, Montaquila, and Fairall that Love-Lane had used profanity and behaved inappropriately. J.A. 1030, 1033-35. At that point, after four investigations had reached precisely the same conclusion, Martin placed a letter of reprimand in Love-Lane's file. J.A. 975A.

The incident between Love-Lane and Anderson only further strained the ability of Blanchfield and Love-Lane to get along. In October 1997, Martin authored a memo to them that addressed the breakdown in their working relationship and its adverse effect on the administration of Lewisville Elementary. J.A. 473. Rather than assign blame, Martin charged Blanchfield and Love-Lane with rebuilding their relationship and achieving the loyalty, trust, and mutual respect necessary to function effectively as an administrative team. J.A. 473.

Unfortunately, Love-Lane's working relationships with others in the school system further declined during the 1997-98 school year. For example, in January 1998 Love-Lane had a meeting with the six fifth-grade teachers at Lewisville. The teachers came away so upset by Love-Lane's tone during the

meeting that the entire group requested they be assigned a new administrator for the rest of the school year. J.A. 728-29. When Blanchfield repeatedly declined their request, several of the teachers took the unusual step of appealing to Martin himself. J.A. 970-71. In the process, the teachers complained about Love-Lane's poor communication on issues like a grant proposal, school-sponsored sleepover, and food drive. J.A. 725, 727-31, 957- 58. Notably, as with the earlier disputes between Blanchfield and Love-Lane over administrative tasks like bus duty, these disagreements had nothing to do with Love-Lane's speech on racial issues.

By this point, Martin had devoted considerable time and energy to Love-Lane's disagreements with others at Lewisville. Neither Bell nor Montaquila felt that Love-Lane had responded encouragingly to their suggestions for improvement, and this squared with Martin's own observations. Martin then did precisely what he had outlined in his October 1997 memo to Blanchfield and Love-Lane: he reorganized the administrative team at Lewisville Elementary, because Blanchfield and Love-Lane had been unable to establish an effective working relationship. Blanchfield was transferred to the central office, receiving a substantial reduction in her salary. J.A. 971-72. And Love-Lane was reassigned to a teaching position for the 1998-99 school year. J.A. 971, 986.

Love-Lane filed a formal grievance with the school board in response to her reassignment. The board specifically found that Martin's decision was amply supported by the performance evaluations of Love-Lane, the results of the investigations into the incident between Love-Lane and Anderson, and Love- Lane's failure to achieve the standards set out in Martin's October 1997 memo. J.A. 281-84, 327. Love-Lane did not present the board with any evidence that her reassignment was in retaliation for her speech on racially

charged issues. J.A. 278-79. Rather, all of the evidence submitted to the board by both Love- Lane and Martin indicated that Love-Lane believed she was being harassed and sabotaged by Blanchfield, while Blanchfield believed she was being disrespected and undermined by Love-Lane. J.A. 278-81. In short, this was a bitter and acrimonious dispute between two employees. Martin wanted them to function as a team, and when they proved unable to do so, he did what sensible employers often do: he lessened their professional responsibilities. It is important moreover that Martin in no way singled out Love-Lane for reassignment. Instead, he sought to restructure the entire administrative team.

II.

The doctrine of qualified immunity exists precisely so that government officials can make reasonable discretionary decisions without the paralyzing fear of legal liability. *See, e.g., Pinder v. Johnson,* 54 F.3d 1169, 1173 (4th Cir.1995) (en banc) ("Qualified immunity thus allows officials the freedom to exercise fair judgment...."). Qualified immunity therefore protects government officials "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton,* 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In addressing this question, we do not impose on officials "a duty to sort out conflicting decisions or to resolve subtle or open issues. 'Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines.'" *McVey v. Stacy,* 157 F.3d 271, 277 (4th Cir.1998) (quoting *Maciariello v. Sumner,* 973 F.2d 295, 298 (4th Cir.1992)).

Simply put, Martin's decision to reassign Love-Lane to a teaching position transgressed no bright line; it violated no clearly established constitutional right. Indeed, it is unlikely that Martin's decision to reassign Love-Lane violated her right

to free speech at all. To determine whether Love-Lane even has a cause of action under the First Amendment for retaliatory demotion, we must balance Love-Lane's interest in commenting upon matters of public concern against the school system's interest in providing effective educational services at Lewisville Elementary. *McVey*, 157 F.3d at 277 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)); Thus we must ascertain (1) whether Love-Lane was speaking as a citizen upon a matter of public concern or as an employee upon a matter of personal interest; (2) whether Love-Lane's interest in speaking on the matter of public concern outweighed the school system's interest in providing effective educational services; and (3) whether Love-Lane's speech was a substantial factor in Martin's decision to reassign her. *Id.* at 277-78. I shall address the three prongs of the inquiry in turn.

A.

The first question is whether Love-Lane was even speaking as a citizen upon a matter of public concern or rather as an employee upon a matter of personal interest. Insofar as Love-Lane objected to Lewisville's use of the time-out room because of its alleged discriminatory impact on minority students, she may well have been speaking on a matter of public concern. Yet any administrator or teacher is likely over time to speak out on some matter of concern to local parents and residents. This ought not convert a routine personnel decision into a constitutional infraction. After all, Love-Lane expressed herself on a whole host of issues, from bus duty to her own performance evaluation, that were purely internal matters of school administration.

In fact, it was Love-Lane's expression on these administrative matters, not her opposition to the time-out room, that drove her difficulties at Lewisville. The majority's

claim that "teachers and administrators who took offense at Love-Lane's manner or tone also took offense at the content of her speech opposing race discrimination" finds no support in the record. *Ante* at 778. For instance, in the four pages of complaints about Love-Lane presented by the fifth-grade teachers to Blanchfield and then Martin, the teachers do not even mention Love-Lane's opposition to the time-out room or any other disciplinary practice. J.A. 727-28, 730-31. In the extensive documentation compiled by the four separate investigations of the argument between Love-Lane and Angie Anderson, there is no hint that Love-Lane's opposition to any disciplinary practice, including the time-out room, was a factor in the confrontation. J.A. 845-47, 877-79, 943-45, 1033-35. In Love-Lane's many lengthy memos to Blanchfield, Martin, and Montaquila throughout 1997, she does not include her opposition to any disciplinary practice as a source of friction between her and others at Lewisville. J.A. 858-60, 866-67, 871-72, 1011, 1251.

Indeed, even as late as the board hearing on Love-Lane's reassignment, Love-Lane and her counsel maintained that the disagreements between Blanchfield and Love-Lane were "personal in nature" and that Love-Lane's career "was being sabotaged by Ms. Blanchfield." J.A. 278-79. Love-Lane never argued, and thus the board never considered, that she was being retaliated against for having spoken out on allegedly discriminatory practices at Lewisville. For Love-Lane to argue now that her reassignment resulted from her opposition to the time-out room, she must assign hugely disproportionate weight to the fraction of her speech that touched on a matter of public interest. Portraying Love-Lane's speech as primarily of public concern is more the product of counsel's post-hoc creativity than of any actual events at Lewisville.

The majority gets it backward, then, when it says the dissent's focus is too limited. *See ante* at 777. The point is

that Love-Lane's speech on allegedly discriminatory practices was but a small part of her tenure at Lewisville. When one examines the "context" of Love-Lane's speech "as revealed by the whole record," it could hardly be clearer that Love-Lane and others were at odds over a slew of matters having no connection to public concerns. *Connick v. Myers,* 461 U.S. 138, 147-48, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Relationships foundered and deteriorated over the day-to-day details of school administration, and they became poisoned to the point where someone in charge simply had to make a change.

B.

Even if one were to overlook the fact that the bulk of Love-Lane's speech bore no relation to matters of public concern, Love-Lane's interest in expressing herself still must be weighed against the interest of the Board and the Superintendent in "discipline, morale and good working relationships" at Lewisville Elementary. *Cromer v. Brown,* 88 F.3d 1315, 1328 (4th Cir.1996); *see also Pickering v. Board of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968). The district court properly found that Martin's interest in maintaining an orderly, effective administration at Lewisville outweighed Love-Lane's speech interest.

Indeed, the district court conducted an extensive review of the record in this case, and it emphatically concluded that Love-Lane had proceeded in a confrontational manner disruptive to Lewisville's operation. According to the district court, Love-Lane antagonized and insulted those who used the Time-Out Room and refused to assist the Time-Out Room coordinator in its administration. She failed to develop effective working relationships with other staff, driving some to appeal to the superintendent to replace her. She used profanity in an inappropriate confrontation with a teacher. She

resisted feedback or constructive criticism. She repeatedly challenged her principal's judgment. She refused to rebuild an effective working relationship with Blanchfield.... In the face of all this, it simply blinks reality to claim that Love-Lane's difficulties with others at Lewisville "did not affect the ability of administrators and teachers at Lewisville to deliver their educational services." *Ante* at 779. When Blanchfield and Love-Lane were constantly at each other's throats; when Love-Lane and Anderson were shouting at each other in the hallways; or when an entire group of teachers were complaining that they had been repeatedly undermined by Love-Lane, the effective operation of Lewisville Elementary had given way to internal divisiveness. And that is to say nothing of the time and energy that Martin, Bell, and Montaquila each had to devote to the incessant conflict at Lewisville. In fact, in his October 1997 memo to Blanchfield and Love-Lane, Martin wrote that theirs was the most acrimonious and divisive conflict between two administrators he had ever seen. J.A. 976.

In the face of such protracted infighting, Martin concluded that the effective administration of Lewisville was being hampered. He did not jump to this conclusion, and he did not assign either Blanchfield or Love-Lane exclusive blame. He simply believed that the situation had to be changed. Martin's professional judgment in this regard is entitled to respect. "When close working relationships are essential to fulfilling public responsibilities, *a wide degree of deference* to the employer's judgment is appropriate." *Connick v. Myers,* 461 U.S. 138, 151-52, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) (emphasis added). We need not rely on Martin's subjective judgment that Love-Lane's speech harmed cohesiveness and efficiency at Lewisville. Rather, there was ample objective evidence that underpinned Martin's judgment and on which the district court relied.

The majority shows no deference at all to Martin's judgment, largely because it focuses only on the disruption caused by the substance of Love-Lane's speech, and not on the disruption caused by Love-Lane's antagonistic manner. Yet in weighing the interests of Love-Lane and the school system, Love-Lane's speech "[is] not [to] be considered in a vacuum; the *manner,* time, and place of [Love-Lane's] expression are relevant, as is the context in which the dispute arose." *Rankin v. McPherson,* 483 U.S. 378, 388, 107 S.Ct. 2891, 97 L.Ed.2d 315 (1987) (emphasis added). We have repeatedly balanced the respective interests not merely in terms of the "subject" on which the employee speaks, but also in terms of the "manner, time, and place" in which an employee elects to express himself. *DiMeglio v. Haines,* 45 F.3d 790, 805-06 (4th Cir.1995); *see also Edwards v. City of Goldsboro,* 178 F.3d 231, 247 (4th Cir.1999)

The majority's narrow focus is thus out of step with decisions of the Supreme Court, of our own court, and of our sister circuits, which have consistently found that employers are not required to ignore the intemperate tone or confrontational manner in which employees may choose to express themselves. *See, e.g., Craven v. University of Colorado Hosp. Auth.,* 260 F.3d 1218, 1228-29 (10th Cir.2001) (relying on abrasive, offensive manner of employee's speech); *Leary v. Daeschner,* 228 F.3d 729, 738 (6th Cir.2000) (noting disruptive manner of teachers' speech, including yelling at colleagues and consistently questioning the principal's authority); *Hansen v. Soldenwagner,* 19 F.3d 573, 577 (11th Cir.1994) ("Here, the outcome of a *Pickering* balance is especially uncertain because the manner of Hansen's speech was vulgar, insulting, and defiant."); *Germann v. City of Kansas City,* 776 F.2d 761, 764-65 (8th Cir.1985) (discussing harsh and distrustful tone of employee's letter as important factor in *Pickering* balancing); *McBee v. Jim Hogg County, Tex.,* 730 F.2d 1009, 1017 (5th Cir.1984) (en banc)

(considering whether employee's speech was "sufficiently hostile, abusive or insubordinate as to disrupt significantly the continued operation of the [employer's] office").

It makes little sense to consider whether the substance of Love-Lane's speech harmed morale, close working relationships, or institutional efficiency, and yet not consider whether her tone or manner did precisely the same thing. "[T]he employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the manner, time, and place in which it is delivered." *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 415 n. 4, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). How one says something, in addition to simply what one says, can undermine the morale and close working relationships essential to a productive workplace.

Of the dozens of witnesses whose statements appear in the record, not a single member of Lewisville's administration or the school system's central office says that Love-Lane acted professionally. As a result, the majority relies primarily on Love-Lane's own assertions that she never acted unprofessionally, but Love-Lane's assertions are entirely unsupported by the record. Four investigations of the Anderson incident concluded that Love-Lane had acted unprofessionally; her principal and the faculty had been alienated by a series of incidents having nothing to do with race; and of course every administrator who intervened at Lewisville, regardless of their gender or race, found Love-Lane's tone and demeanor inappropriately hostile. The majority does not dispute any of this evidence; it simply ignores it.

The majority instead repeatedly points out that this case arises on a motion for summary judgment. *See ante* at 775, 777, 778, 779-781, 782. And on that, we certainly agree. In

ignoring the wealth of undisputed facts, however, the majority accords little respect to the record or to the views of school administrators. *See, e.g., Connick,* 461 U.S. at 151-52, 103 S.Ct. 1684 (according "a wide degree of deference" to school officials' views). Only by failing to consider the way in which Love-Lane spoke can the majority avoid what was obvious to the school system's administrators and to the district court: that the manner in which Love-Lane expressed herself served to "disrupt [Lewisville], undermine [Blanchfield's] authority, and destroy close working relationships." *Connick,* 461 U.S. at 154, 103 S.Ct. 1684.

C.

Thirdly and finally, the majority cannot demonstrate that Love-Lane's speech was a substantial factor in her reassignment. None of the evidence marshalled by the majority establishes that Love-Lane was targeted as a result of her stance on allegedly discriminatory practices. *See ante* at 780-781. Blanchfield did lower Love-Lane's evaluations over time, particularly in the area of communication skills, but that was because Love-Lane had increasingly clashed with members of the faculty. And Blanchfield did consider Love-Lane's "continued vocal opposition to [Lewisville's] implementation of the Time-Out Room as blatant disrespect for [Blanchfield] ... and [Lewisville's] School Improvement Team." Yet Love-Lane was protesting a program that Blanchfield individually and the faculty collectively had approved. It had been operating for two years as a result of the combined efforts of teachers, parents, and administrators. By this point, Blanchfield might reasonably expect that a member of her own administrative team stop openly attacking a program that she, the faculty, and the local community had supported. Blanchfield was upset with Love-Lane not for the substance of her views, which might well have been communicated in any number of constructive ways. Rather,

Blanchfield was upset that Love-Lane seemed intent on continually and confrontationally undermining Blanchfield's authority with her own staff and the local community.

Regardless, focusing on the disputes between Blanchfield and Love-Lane misses the real point. None of this evidence demonstrates that *Martin* retaliated against Love-Lane for her speech. While Martin did consider Blanchfield's evaluations of Love-Lane, he also considered all of the incidents on which those evaluations were predicated: the investigations into the altercation with Angie Anderson, the reports of Montaquila and Bell, the grievance filed by the fifth-grade teachers, and his own first-hand observations of Love-Lane's attitude and demeanor. None of these incidents related to Love-Lane's protest against allegedly discriminatory practices. They related instead to Love- Lane's and Blanchfield's unfortunate personality conflict--a conflict which, to repeat, was resolved evenhandedly by removing from Lewisville both of the offending parties.

III.

Whether Love-Lane has any viable claim under *Pickering* for retaliatory demotion is thus far from certain. The bulk of Love-Lane's speech did not involve matters of public concern; the school system's interest in the efficient administration of Lewisville was substantial and entitled to deference; and Martin possessed ample grounds for reassigning Love-Lane that had absolutely nothing to do with her speech on racial issues. Yet even assuming that Love-Lane has established a free speech claim, her claim is hardly so clearly established that Martin should have known he was acting unlawfully when he reassigned her.

My friends in the majority, however, would strip Martin even of qualified immunity. This is incorrect. It was quite

reasonable for Martin to conclude that Love-Lane's "interest in First Amendment expression" did not outweigh the school system's "interest in efficient operation of the workplace." *Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352 (4th Cir.2000) (quoting *Hanton v. Gilbert*, 36 F.3d 4, 6-7 (4th Cir.1994)). "Just as an employee has a right to speak--even at work--public employers have the right to run efficient, functional operations." *Id.* at 351. This is especially true since "only infrequently will it be clearly established that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a particularized balancing that is subtle, difficult to apply, and not yet well-defined." *DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir.1995) (internal quotations omitted).

The district court properly found that the difficult balance sought here--measuring Love-Lane's free speech interest against the school district's interest in the efficient operation of its schools--was anything but clearly established. While " 'there need not be a prior case directly on all fours with the facts presented to the official,' " it must be clear that "in light of pre-existing law, the unlawfulness of the challenged action was apparent to the official." *Cromer v. Brown*, 88 F.3d 1315, 1325 (4th Cir.1996) (quoting *Pinder v. Johnson*, 54 F.3d 1169, 1173 (4th Cir.1995)

Yet pre-existing law supported the legality of Martin's decision. The disruptiveness of Love-Lane's conduct gave Martin every reason to believe that the *Pickering* balance swung in the school system's favor. Indeed, what the majority deems clearly established is actually a sharp departure from our precedents. For instance, in *Cromer* we denied qualified immunity to a sheriff who had allegedly retaliated against a deputy for protesting racial discrimination within the sheriff's department. *Cromer*, 88 F.3d at 1331. The deputy was one of over thirty minority law enforcement officers who had slipped

a private letter alleging racial discrimination under the sheriff's door. *Id.* at 1320 & n. 2. In performing the *Pickering* balancing test, we specifically relied upon the fact that the officers' concerns "were presented in a non-confrontational way that did not appreciably affect the sheriff's efficiency interests." *Id.* at 1330 n. 11. Here, in contrast, Love-Lane's concerns were presented in a confrontational way that disrupted Lewisville and soured working relationships with Blanchfield, Martin, Montaquila, Bell and much of Lewisville's faculty.

In short, at the time Martin decided to reassign Love-Lane in 1998, prior cases would not have given him any reason to believe that he was acting unlawfully--much less that his unlawfulness was clearly established. The Supreme Court's prior case law, not to mention our own, did not require Martin to ignore reports of obscenity-laden shouting matches in Lewisville's hallways; widespread complaints from his teachers, and indeed his own subordinates, about Love-Lane's unprofessional manner; and evidence of a bitter feud between members of Lewisville's administrative team. Had Martin done nothing, and allowed the situation at Lewisville to deteriorate further, he would have been an ineffectual school superintendent.

One cannot help but wonder what the majority would now require of superintendents like Martin. All told, Martin waited for two years, conducted innumerable conferences and investigations, and personally involved himself in attempts at improvement, while the situation at Lewisville steadily declined despite his efforts. What exactly are school administrators in Martin's shoes henceforth supposed to do? The majority notes vaguely that they should "hear out" someone's "concerns," *ante* at 784-785, but that is *exactly* what Martin did--not just once, but over and over and over again. Administrators like Martin may be forgiven, then, for doubting

that they "will not be hindered by today's decision." *Ante* at 785. Because the *Pickering* balance is itself uncertain, the denial of qualified immunity to the defendant leaves school administrators in a sea of indeterminacy. The majority has reached the point where litigation outcomes are so uncertain, that the prospect of liability deprives those in positions of responsibility of the chance to take steps that may demonstrate educational leadership and earn a community's respect.

IV.

The majority's decision thus deals public education a double blow. It not only strikes the *Pickering* balance against school principals and superintendents, but denies them qualified immunity as well. It ought not be necessary to catalog the harms done to public education by the majority's one- two punch, except that the majority disavows that its decision will do any such harm. *See ante* at 784-785. In fact, stripping Martin of qualified immunity for his decision to reassign a pair of squabbling administrators begins by harming our circuit's superintendents, whose reasonable personnel decisions will now increasingly be the subject of federal lawsuits. But it ends by harming our circuit's children and teachers, who depend on strong administrators for collegial and orderly schools that produce lessons rather than lawsuits.

As I have explained, I believe that this case involves little more than a poisonous personality conflict. The majority believes something else. According to the majority, this case is not about Love-Lane's inability to get along with others; it is instead about Love-Lane's outspoken opposition to a disciplinary program that had been approved by Lewisville's parents, teachers, and administration. *See ante* at 775. If we take the majority on its own terms, we ought indeed to be troubled. There is no question that Love-Lane had the opportunity to voice her objections, which simply did not

persuade others at Lewisville. And there is no question that Love-Lane could have made valuable contributions to life and disciplinary practice at Lewisville in any number of constructive ways. But communities like Lewisville should be able to implement their disciplinary decisions, without the unremitting opposition of the very administrators charged with carrying out those decisions. Instead, localities will now find their efforts at disciplinary improvement the subject of litigation.

As any school teacher knows, this is regrettable. Keeping order in our nation's schools is among our most pressing educational concerns. *See, e.g., New Jersey v. T.L.O.,* 469 U.S. 325, 339, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) ("Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."); *People v. Pruitt,* 278 Ill.App.3d 194, 214 Ill.Dec. 974, 662 N.E.2d 540, 545 (1996) ("We long for the time when children did not have to pass through metal detectors on their way to class, when hall monitors were other children, not armed guards, when students dressed for school without worrying about gang colors."). Sadly, almost half of America's teachers report that they spend more time trying to keep order in their classrooms than actually teaching students. *See* Jean Johnson & Ann Duffett, Public Agenda, *Where We Are Now: 12 Things You Need to Know About Public Opinion and Public Schools* 16 (2003).

Of course, a breakdown in order and discipline leaves teachers unable to educate and students unable to learn. *See, e.g., T.L.O.,* 469 U.S. at 350, 105 S.Ct. 733 (Powell, J., concurring) ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students."). And yet the consequences stretch far beyond missed opportunities for learning, because the more severe a

school's disciplinary problems are, the more likely it is that the school's students will be victims of violent or even extremely violent encounters. *See* Amanda K. Miller & Kathryn Chandler, U.S. Department of Education, *Violence in U.S. Public Schools: 2000 School Survey on Crime and Safety* 20 (2003). It is not difficult to understand, then, why an overwhelming number of Americans believe that the lack of student discipline is a serious problem in their local schools. *See* Johnson & Duffett, *Where We Are Now* at 26.

The majority is unwilling to trust the efforts of public school systems to bring about disciplinary improvement. It places its bet not on the ability of communities to devise their own solutions to disciplinary problems, but on litigation that serves to undercut those very same solutions. The majority's unwillingness to allow communities to recognize problems and address them through the medium of democracy does serious harm to public education. It siphons off educational efforts into depositions and scarce educational dollars into attorneys' fees. It places accountability in the courts rather than in school boards and the administrators answerable to them. "Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system." *Freeman v. Pitts*, 503 U.S. 467, 490, 112 S.Ct. 1430, 118 L.Ed.2d 108 (1992). To be sure, democratic processes are robust and sometimes produce decisions that do not please everyone. Yet to displace democracy too readily with judicial supervision is to discourage joint and voluntary efforts at improvement and ultimately to miss out on the more generous possibilities of America.

The majority disclaims the novelty of its approach, as if its opinion were nothing more than a routine application of *Pickering* and its progeny. *See ante* at 785, 789. With all respect, this is simply not the case. We have never accorded

so little deference to the views of public school administrators or such short shrift to well-established principles of qualified immunity. Under the majority's regime, courts, not schools themselves, will have the final word on questions of school discipline. And with lawsuits waiting in the wings, principals and superintendents will be reluctant to do their part in resolving disciplinary problems or in reconstituting dysfunctional administrative teams.

But nowhere will the effects of this litigation be felt more severely than on the ability of educators to set expectations for their students. Only by establishing such expectations can schools bring out the best in children and give them every chance at success. But setting expectations requires order in public school systems and strong working relationships between public school officials. It requires that school authorities be able to set reasonable goals for their local administrators, who in turn set standards for the students they are charged with educating. In short, expectations for an orderly environment go hand-in-hand with expectations for a creative and productive learning experience. To have litigation at every turn is the surest way to undercut the standards that challenge students and the expectations that form the essence of education itself.

V.

In the final analysis, even if we disagree with Martin's personnel actions, his educational philosophy, his view of school discipline, or his feelings about the need for cooperative relations at the head of a school within his district, that is a far cry from saying that he violated clearly established federal law. In holding that he did, my fine colleagues have made a serious mistake.

Martin, like most teachers, principals, and superintendents,

presumably entered the public school system to educate children, not to engage in the debilitating litigation that this lawsuit has come to represent. If decisions like Martin's are going to sow the seeds of federal actions, school administrators will either be cowed into inaction or they will seek the greener pastures of private schools, where education, not litigation, remains the top priority. I am well aware that many children "do[ ] not have the option of going to a private school or somewhere else," *ante* at 786, but the teachers and principals who educate them do--and the majority is chasing them from public schools.

That is a shame, because public education represents something quite special in this country--the opportunity for Americans of all races and ethnicities and backgrounds to prepare together for the challenges and responsibilities of citizenship. Public school systems deserve the best this nation has to offer. But the best educators have other opportunities, both within education and without, and the inability to pursue learning without lawsuits is driving them away from where America needs them most. To eviscerate the doctrine of qualified immunity, as the majority has done here, is to subject public schools uniquely to the omnipresent spectre of litigation, to the detriment of the children and communities they were intended to serve. I commend and would affirm the judgment of the district court. 355 F.3d 766, 93 Fair Empl.Prac.Cas. (BNA) 282, 184 Ed. Law Rep. 133, 20 IER Cases 1409

VACATED IN PART, AFFIRMED IN PART, AND REMANDED.

UNITED STATES DISTRICT COURT,
MIDDLE DISTRICT OF NORTH CAROLINA

DECOMA LOVE-LANE
Plaintiff,
v.
DONALD MARTIN, Individually and in his official capacity as Superintendent of the Winston-Salem/Forsyth County Schools, and the Winston-Salem Forsyth County Board of Education, Defendants.

No. 1:99CV00735.

March 26, 2002.

OSTEEN, District Judge

Plaintiff DeComa Love-Lane filed this action against Dr. Donald Martin, Superintendent of the Winston-Salem/Forsyth County Schools ("Martin") and the Winston-Salem/Forsyth County Board of Education ("Board") on August 26, 1999. Plaintiff, who is black, alleges in her Amended Complaint that Defendants discriminated against her on the basis of her race and denied Plaintiff's rights to free speech, equal protection, and due process of law, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* and 42 U.S.C. § 1981, 42 U.S.C. § 1983, the U.S.Constitution, and the North Carolina Constitution.

This matter is now before the court on Defendants' Motion for Summary Judgment. For reasons set forth in this opinion, Defendants' Motion for Summary Judgment will be granted.

I. FACTUAL BACKGROUND

Plaintiff was hired by the Winston-Salem/Forsyth County Schools as a teacher in 1974. After 14 years as a teacher, Plaintiff was promoted to assistant principal in 1988. Plaintiff worked in this capacity for three years before being assigned as assistant principal at Lewisville Elementary School ("Lewisville") in 1995.

In her first year at Lewisville, 1995-96, Plaintiff enjoyed a satisfactory working relationship with the principal, Ms. Brenda Blanchfield, and earned a superior evaluation at the end of the year. However, during the following school year, 1996-97, the conflicts giving rise to this litigation began to develop. Plaintiff began to complain to various teachers and administrators about their treatment of students at Lewisville. Much of her concern focused on the use of the so-called "Time-Out Room," a room for students who needed to be temporarily removed from the classroom due to behavior problems.[1] Plaintiff alleged that arbitrary disciplinary practices among teachers had led to a disproportionate number of black and poor white students being sent to the Time-Out Room, often for minor infractions.

Plaintiff expressed her disapproval of these allegedly discriminatory practices in a very direct and abrupt manner at staff meetings and other school settings. Following one of the staff meetings at which Plaintiff had voiced her opposition to

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[1]The Time-Out Room was the result of months of planning and input from teachers, administrators, and parents. Designed as an alternative to formal disciplinary measures, such as suspension, the Time-Out Room was intended to correct disruptive behavior in a constructive manner. Written procedures and guidelines governed the operation of the room.

the Time-Out Room and the teachers who used it, a number of teachers complained to Blanchfield that Plaintiff had called them "unprofessional." Additionally, Plaintiff refused to fulfill her administrative duties with regard to the Time-Out Room.[2] When the Time- Out Room coordinator called Plaintiff for assistance in dealing with a disruptive student, Plaintiff sometimes did not respond to the request at all, or if she did come to the Time-Out Room, did not attempt to correct the disruptive student's behavior.

Plaintiff's relationships with Blanchfield and the faculty at Lewisville suffered as a result of these conflicts. In an effort to improve these relationships, the assistant superintendent in charge of Lewisville at that time, Ron Montaquila, conducted several meetings with Plaintiff and Blanchfield during the course of the school year to address Plaintiff's communication skills. Plaintiff refused to accept any constructive criticism and denied that she had a communication problem. The assistant superintendent related these impasses to Superintendent Martin.

Martin began meeting with Plaintiff and Blanchfield late in the 1996-97 school year in an attempt to improve communication. Martin observed that Plaintiff frequently voiced disagreement with Blanchfield in a disrespectful manner and refused to follow her instructions even on relatively minor matters.[3] Martin attempted to counsel

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[2]Plaintiff, as assistant principal, was required to assist the Time-Out Room coordinator, when needed.

[3]For example, at one meeting, Plaintiff spent a substantial amount of time arguing with Blanchfield over where she had instructed Plaintiff to stand during bus loading. Blanchfield had instructed Plaintiff to stand outside; Plaintiff wished to stand inside.

Plaintiff and Blanchfield at these conferences on how to improve their working relationship.

In the spring of 1997, Blanchfield issued Plaintiff's year-end evaluation. Although most of the ratings were high, in the area of communication Blanchfield rated Plaintiff below the superior level. Blanchfield explained to Plaintiff that the teachers found her style of communication condescending and insensitive. Plaintiff became upset and disputed Blanchfield's assessment, threatening to file a grievance. She told Martin that Blanchfield was simply reacting to Plaintiff's tendency to speak out on racial issues. She requested a transfer, which was denied.

Around the same time, Plaintiff's administrator contract was coming up for renewal. Despite the fact that she had given Plaintiff a below-superior rating for communication, Blanchfield initially recommended to Martin that Plaintiff receive a three-year contract renewal. When Martin objected, citing Plaintiff's communication problems, Blanchfield changed her recommendation to a two-year renewal. Blanchfield also requested that Plaintiff no longer be assigned to Lewisville.

On the last day of school before the 1997 summer recess, Plaintiff was involved in a heated confrontation with a teacher, Ms. Angie Anderson, in the hallway near Plaintiff's office. Both Plaintiff and Ms. Anderson reported the confrontation to Montaquila, each alleging that the other had used profanity. Blanchfield investigated the incident and concluded that both Anderson and Plaintiff had acted inappropriately and used profanity and thus deserved reprimands. After reviewing Blanchfield's investigation, Montaquila agreed. Plaintiff, however, objected to the reprimand, and the matter was referred to the human resources manager, David Fairall. After reviewing the investigation, Fairall concluded that reprimands

for both Anderson and Plaintiff were proper.

In response, Plaintiff filed a formal grievance, alleging that she was being reprimanded because she had reported incidents and practices at Lewisville which she believed were racially discriminatory. A second investigation into the Anderson incident was completed by John Siskind, a paralegal with the school district. Siskind determined that Blanchfield's investigation had been fair and affirmed her decision that both Anderson and Plaintiff deserved reprimands.

Near the end of the grievance process, in the fall of 1997, Martin met once again with Plaintiff and Blanchfield and outlined his expectations for the coming year. Martin emphasized that Plaintiff needed to work effectively with Blanchfield. In a memorandum dated October 27, 1997, Martin clearly warned Plaintiff that if she did not rebuild a working relationship with Blanchfield and respect the principal's authority, she would no longer have a future as an administrator within the school district.

Despite Martin's efforts, the 1997-98 school year was marked by further conflicts involving Plaintiff. Plaintiff disagreed with several of Blanchfield's decisions and instructions regarding a re-allocation of responsibility among herself, Plaintiff, and another assistant principal. Additionally, in early 1998, a group of fifth-grade teachers under Plaintiff's supervision approached Blanchfield, detailing numerous communication problems with Plaintiff and requesting a different supervisor. The teachers related that they felt Plaintiff had undermined their relationships with parents and students by frequently making decisions without consulting them, changing previous decisions without informing them, and accusing them of lying. When Blanchfield denied their request, the teachers took their concerns directly to Martin and asked him to intervene on their behalf.

Throughout the 1997-98 school year, Amanda Bell, the assistant superintendent over elementary schools, also met with Plaintiff and Blanchfield in an effort to smooth their working relations. Bell noted that Plaintiff expressed herself in an unprofessional and disrespectful manner in these meetings and consistently refused to accept constructive criticism. She reported the outcome of these meetings to Martin.

At the end of the 1997-98 school year, Blanchfield's evaluation of Plaintiff was much lower than her previous evaluations. Before releasing the evaluation to Plaintiff, Blanchfield provided it to Bell and Martin for their review. After reviewing the evaluation, Martin concluded that Plaintiff had failed to meet his expectations as outlined in his October 1997 memorandum. He decided to assign Plaintiff to a teaching position for the remainder of her contract term (at her assistant principal salary) and not to renew her contract. Martin based this decision on Plaintiff's evaluation, his discussions with Plaintiff and Blanchfield, his review of various documents from Plaintiff and Blanchfield, the Anderson incident, hisc onversations with Assistant Superintendents Bell and Montaquila, and his conversations with the fifth-grade teachers. A letter explaining this decision was delivered to Plaintiff along with her final evaluation.

As part of his decision that Lewisville would be better off with new leadership for the 1997-98 school year, Martin encouraged Blanchfield to take an administrative position at the school district's Central Office. Blanchfield did so, taking a pay cut as a result.

Plaintiff filed another formal grievance in response to her reassignment to a teaching position. A three-member panel of the school board heard the grievance on August 4, 1998. Both Plaintiff and the school system were represented by counsel,

who, along with the parties, made statements to the panel. After considering the evidence before it, the panel affirmed Martin's decision by a vote of two to one.

Because the decision was not unanimous, Plaintiff exercised her right to have her grievance heard before the full Board. After reviewing the record of the panel hearing, the audio recording of the panel hearing, and arguments from both attorneys, the Board voted on June 29, 1999, to affirm the decision of the panel.

During the course of her employment with Winston-Salem/Forsyth County Schools as an assistant principal, Plaintiff also applied for a number of principal positions. The procedure employed to select candidates for an opening involved a team composed of two teachers from the school with the opening, the assistant superintendent over the grade level with the opening, two members of the Board, and a human resource representative. The team first performed an initial screening process, during which it interviewed promising candidates. After the first round of interviews, the selection team picked three finalists for further interviews and the final selection. Martin did not participate in the interviewing process until after the finalists were selected.

Under this system, black applicants were selected as finalists for a number of positions for which Plaintiff applied. Plaintiff, however, was not selected as a finalist for any of the positions. Ultimately, black applicants were chosen to fill almost half of the principal positions for which Plaintiff applied.

II. DISCUSSION

A. *Standard of Review*

Summary judgment is appropriate when the pleadings and other submissions show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). A mere scintilla of evidence supporting plaintiff's claims is insufficient to overcome a motion for summary judgment; there must be enough evidence for a reasonable jury to find for plaintiff. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S.Ct. 2505, 2512, 91 L.Ed.2d 202 (1986).

B. *Title VII and § 1981 Claims*

Plaintiff alleges that Defendants discriminated against her on the basis of her race by denying her applications for principal positions, denying her requests for a transfer, failing to renew her administrator contract, and demoting her from an administrative position to a teaching position, all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and 42 U.S.C. § 1981.

The court notes as a preliminary matter that Plaintiff names both Martin and the Board in her claims for relief under Title VII. However, it is well-established that Congress intended for the Title VII remedial scheme to apply only to employers, not individual supervisors, such as Martin. *See Lissau v. Southern Food Serv.,* 159 F.3d 177, 181 (4th Cir.1998). Thus, Plaintiff's

claim against Martin in his individual capacity will be dismissed. Moreover, Plaintiff's claim against Martin in his official capacity as superintendent actually constitutes a claim against the school district itself, of which he is an agent. *See Kentucky v. Graham,* 473 U.S. 159, 165-66, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985). Because Plaintiff has asserted a cognizable claim against the Board, as the representative body of the school district, Plaintiff's claim against Martin in his official capacity is redundant and will be dismissed. *See Ramsey v. Schauble,* 141 F.Supp.2d 584, 591 (W.D.N.C. 2001).

Claims for employment discrimination under both Title VII and § 1981 are evaluated using the burden-shifting scheme set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See Patterson v. McLean Credit Union,* 491 U.S. 164, 186, 109 S.Ct. 2363, 2377, 105 L.Ed.2d 132 (1989), *superseded in part by* the Civil Rights Act of 1991. Under this scheme, Plaintiff must first establish a prima facie case of discrimination. *See McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824. Only tangible, adverse employment actions may serve as the basis of a prima facie case of discrimination. *See Boone v. Goldin,* 178 F.3d 253, 256 (4th Cir.1999).[4] Such actions typically result from "ultimate employment decisions," such as hiring, discharging, compensation, and promotion. *Page v. Bolger,* 645 F.2d 227, 233 (4th Cir.1981).

If Plaintiff succeeds in establishing a prima facie case, the burden then shifts to Defendants to articulate a legitimate,

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[4]As the Fourth Circuit noted in *Boone,* "Congress did not intend Title VII to provide redress for trivial discomforts endemic to employment." *Boone v. Goldin,* 178 F.3d 253, 256 (4th Cir.1999).

nondiscriminatory reason for their actions. *See McDonnell Douglas,* 411 U.S. at 802, 93 S.Ct. at 1824. If Defendants do so, the "presumption of discrimination drops out of the picture," and Plaintiff must prove that the legitimate, nondiscriminatory reasons offered by Defendants to explain their actions were merely a pretext for discrimination. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133, 143, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000); *see also St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 519, 113 S.Ct. 2742, 2754, 125 L.Ed.2d 407 (1993) (noting that "[i]t is not enough . . .to *dis* believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination").

Plaintiff has cited three adverse employment actions by Defendants which she claims were racially discriminatory: 1) failing to promote her to principal or transfer her to another position; 2) failing to renew her administrator contract; and 3) reassigning her to a teaching position. Because Plaintiff's contract non-renewal and subsequent reassignment essentially stemmed from a single action, they will be discussed jointly.

1. *Failure to promote or transfer*

In order to establish a prima facie case of discriminatory failure to promote, Plaintiff must prove that 1) she is a member of a protected class; 2) she applied for the position in question; 3) she was qualified for the position; and 4) she was rejected for the position under circumstances giving rise to an inference of unlawful discrimination. *See Carter v. Ball,* 33 F.3d 450, 458 (4th Cir.1994).

Plaintiff, a black woman, is a member of a protected class. Moreover, the evidence has established that she applied for a number of principal positions, both before and after Martin became superintendent of schools. Plaintiff also has presented

limited evidence of her qualifications for these positions, primarily in the form of evaluations from two principals she worked under in the past recommending that she be promoted to principal. However, Plaintiff admits in her response brief to Defendants' summary judgment motion that the evidence on her failure to promote claim is "incomplete," citing a pending discovery motion. (Pl.'s Br.Resp.Defs.' Mot.Summ.J. at 18.)[5] Nevertheless, Plaintiff does present the court with the following summary of her argument in a footnote without any citations to the record: 1) Prior to Martin becoming superintendent, Plaintiff received "several" interviews for principal positions; yet 2) during Martin's tenure, Plaintiff has received "but three" interviews; and 3) Plaintiff has never been awarded a principalship. (*Id.* at 18 n. 6.)

These facts, without more, fall short of what might constitute circumstances giving rise to an inference of unlawful discrimination. *See Carter,* 33 F.3d at 458. Plaintiff has presented no facts tending to show that only people outside of her class were selected for principal positions, or that persons less-qualified than she were chosen. To the contrary, the uncontroverted evidence presented by Defendants shows that almost half of the positions for which Plaintiff applied were eventually awarded to black applicants. Moreover, from 1997 onwards, black applicants were chosen for five out of seven principal positions. The court finds no evidence supporting an inference of unlawful discrimination. Consequently, the court finds that Plaintiff has failed to

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[5]Plaintiff's Motion to Compel, filed December 22, 2000, was denied by the magistrate judge on February 28, 2001, approximately one month after Plaintiff's response brief was filed with the court. The magistrate judge's decision was affirmed by order of this court on April 27, 2001.

establish a prima facie case on her failure to promote claim.

Plaintiff's "failure to transfer" claim is not actionable under Title VII because it does not constitute an adverse employment action. *See Boone,* 178 F.3d at 256 (only discrimination as to ultimate employment decisions such as hiring, granting leave, firing, promotion, and compensation constitute adverse actions). Plaintiff has cited no legal support to the contrary. As a result, her claim based on failure to transfer will be dismissed.

2. *Reassignment/Non-renewal of Administrator Contract*

To establish her prima facie case that Defendants' decision not to renew her administrator contract and reassign her to a teaching position was discriminatory, Plaintiff must prove that 1) she is a member of a protected class; 2) she suffered an adverse employment action; 3) at the time of the action, she was "performing at a satisfactory level and meeting [her] employer's legitimate expectations"; and 4) she was replaced by someone outside her protected class following the action. *Murphy v. Danzig,* 64 F.Supp.2d 519, 522-23 (E.D.N.C.1999) (citing *Karpel v. Inova Health Sys. Servs.,* 134 F.3d 1222, 1228 (4th Cir.1998)).

As with Plaintiff's failure to promote claim, Plaintiff must overcome the hurdle of proving that she has suffered an adverse employment action before she can advance this theory. *See Boone,* 178 F.3d at 256. While non- renewal of a contract, standing alone, might constitute an adverse action under *Boone, see* 178 F.3d at 256, reassignment to a new job could be characterized as a neutral or even advantageous action, depending on the circumstances. In order to prove that her reassignment was in fact an adverse action under the circumstances, Plaintiff must prove that her reassignment resulted in lower pay, involved less responsibility, or required

a "lesser degree of skill" than her previous assignment. *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 799 (10th Cir.1993), *overruled on other grounds by Buchanan v. Sherrill*, 51 F.3d 227 (10th Cir.1995); *see also Boone*, 178 F.3d at 256 (reassignment must have detrimental effect on employee to be actionable).

In the present case, it is significant that following Plaintiff's reassignment, her pay remained at the assistant principal level for the remainder of her contract term. Thus, she did not suffer any adverse financial consequences as a result of the reassignment. Admittedly, Plaintiff no longer held an administrative role, but this evidence alone does not necessarily indicate that Plaintiff's job as a teacher involved less responsibility, only that it involved responsibility of a non-supervisory kind. Moreover, Plaintiff has submitted no evidence that her teaching position involved a "lesser degree of skill." The court's duty at the summary judgment stage of the proceedings, however, is to draw all reasonable inferences in favor of Plaintiff, the non-moving party. *See Edell & Assocs. v. Law Offices of Peter G. Angelos*, 264 F.3d 424, 435 (4th Cir.2001). Therefore, despite the shortfalls in this element of Plaintiff's prima facie case, the court will infer from the evidence Plaintiff has presented (namely, that Plaintiff was deprived of her supervisory responsibilities) that Plaintiff's non-renewal and subsequent reassignment were an adverse action for purposes of her prima facie case.

Moving to the third element of Plaintiff's prima facie case, Plaintiff must next establish that at the time of her reassignment to a teaching position, she was performing her duties as assistant principal satisfactorily and meeting her employer's legitimate expectations. *See Murphy*, 64 F.Supp.2d at 522-23. It is here that Plaintiff's case falls short, as the evidence clearly demonstrates that Plaintiff was *not* performing satisfactorily prior to her reassignment. Beginning

in the 1996-97 school year, Plaintiff was involved in several clashes with teachers and Blanchfield regarding the Time-Out Room and was uncooperative when her assistance was needed in the Time- Out Room. Plaintiff's communication style was variously described as intimidating, abrupt, overly-aggressive, disrespectful, and unprofessional. Plaintiff refused to accept the constructive criticism offered by the assistant superintendent and Blanchfield with regard to improving her communication style and her relationships with teachers.

Not surprisingly, Plaintiff received a "below-superior" rating in the area of communication on her year-end evaluation from Blanchfield. When Blanchfield explained the basis for her rating, Plaintiff became very upset, refused to accept responsibility for the rating and threatened to file a grievance. Moreover, Plaintiff told Martin that Blanchfield had only given her the rating because she had spoken out on "racial issues."

Plaintiff was also involved in a heated confrontation with a teacher in the spring of 1997, in which both parties used profanity and behaved in an unprofessional and inappropriate manner. Plaintiff was formally reprimanded for this incident.[6]

Additional evidence of Plaintiff's unsatisfactory performance is apparent from the record of the 1997-98 school year. Plaintiff continued to spar with Blanchfield on various

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[6]Plaintiff objected to Blanchfield's decision to reprimand her, precipitating an independent review of Blanchfield's investigation by the human resource manager. When the human resource manager had reviewed the incident and determined that a reprimand was indeed appropriate, Plaintiff filed a formal grievance. After a second full review, the decision to reprimand Plaintiff was once more affirmed.

policy issues, including the Time-Out Room and a redistribution of responsibility between Plaintiff, Blanchfield, and another assistant principal. Additionally, in January 1998, a group of fifth-grade teachers became so dissatisfied with Plaintiff's supervision that they requested that Blanchfield assign them a new supervisor. When Blanchfield declined to do so, the teachers appealed to Martin, specifically describing their dissatisfaction with Plaintiff's communication and supervision.

The assistant superintendent responsible for Lewisville conducted several more meetings between Plaintiff and Blanchfield during the 1997-98 school year in an effort to resolve their conflicts. At these meetings, the assistant principal witnessed Plaintiff behave in an inappropriate and disrespectful manner. As during the previous year's meetings, Plaintiff refused to accept constructive criticism.

Plaintiff's less than satisfactory performance was further reflected in a low evaluation from Blanchfield in the spring of 1998. On a six-level scale, Plaintiff received ratings in the bottom half of the scale for six of eleven "major function" areas in which she was evaluated. In the major function area entitled "Implementing the School Program," Plaintiff received an "At Standard" rating, with a note from Blanchfield that "She has not been effective in working with staff to address areas for their improvement." Plaintiff also received an "At Standard" rating in the area of "Evaluating and Remediating the School Program," with the note that she needed to provide feedback to the staff in a more timely manner. (Blanchfield Decl.Ex. 4.)

In the major function area of "Keeping Professionally Competent," Plaintiff received a "Below Standard" rating, with a notation that "DeComa resisted efforts to address improvement in communication and working relationships."

Blanchfield gave Plaintiff an "At Standard" rating in the area of "Handling Disciplinary Procedures," observing that Plaintiff needed to develop better feedback to teachers with respect to discipline referrals and that some teachers felt that Plaintiff had "pitted" students against them. (*Id.*)

Blanchfield gave Plaintiff a "Below Standard" rating in the area of "Coordinating and Communicating the Schools [sic] Formal Structure," stating that Plaintiff had "resisted carrying out assigned tasks with a passive- aggressive response." In the area of "Assisting in Record Keeping," Plaintiff received an "At Standard" rating, with the note that she did not always follow through with the principal's directions as to how to complete tasks. In the area of "Facilitating Organizational Efficiency," Plaintiff received the lowest possible rating, "Unsatisfactory." Blanchfield noted here that there had been "numerous difficulties in dealing with staff," and that Plaintiff "frequently tries to circumvent principal in dealing with parents and staff." Blanchfield offered the following comments at the end of Plaintiff's evaluation:

> Although DeComa has the intelligence, knowledge, and skills to be an administrator, she continues to be ineffective in developing good open communications or quality working relationships with staff. She resists any feedback/suggestions for improvement. She has not been effective as an Asst. Principal at Lewisville this year.

(*Id.*)

This evidence clearly establishes that Plaintiff was not performing satisfactorily in her position as assistant principal at the time of her reassignment. *See Murphy*, 64 F.Supp.2d at 522-23. Moreover, Plaintiff also failed to meet the legitimate expectations of her employer, despite the fact that these expectations were clearly communicated to Plaintiff. *See id.*

Martin told Plaintiff in several conferences and an October 1997 memorandum that she needed to work effectively with Blanchfield in order to retain her position as an administrator.

Martin told Plaintiff that she must demonstrate during the remainder of the 1997-98 school year that "she is able and willing to respect the authority of the principal and to rebuild that degree of trust that is necessary for her to function effectively as a school administrator." Martin went on to state,

> If she is able to put the past behind her and rebuild a working relationship with Mrs. Blanchfield, she will have convinced me that she has a future as a school administrator with the WS/FCS....In the event that [Plaintiff] is unwilling or unable to re-establish a working relationship with Mrs. Blanchfield, it will convince me that she does not have a future as an administrator with the WS/FCS. Assuming that grounds do not occur for her dismissal or demotion under the provisions of G.S. § 115C-325 during the remainder of her contract's term, WS/FCS will honor the remainder of her two year contract but she will be encouraged to return to the classroom or to seek employment elsewhere.

(Martin Decl.Ex. 2.) Despite these clear warnings, Plaintiff continued to have conflicts with Blanchfield and others throughout the 1997-98 school year, resulting in her low evaluation as detailed above and eventual reassignment.

Due to the overwhelming evidence that Plaintiff was not performing satisfactorily and was not meeting her employer's legitimate expectations as an assistant principal, the court finds that Plaintiff has not established a prima facie case of discrimination with respect to her contract non-renewal and reassignment.

Plaintiff has failed to establish a prima facie case on any of her Title VII/ § 1981 claims. Therefore, summary judgment will be granted to Defendants on each of these claims.

C. *Constitutional Claims*

In addition to her Title VII/§ 1981 claims, Plaintiff has brought claims under 42 U.S.C. § 983 and state law, asserting that Defendants 1) denied her right to free speech and retaliated against her for exercising that right, in violation of the First Amendment of the U.S. Constitution and the North Carolina Constitution; 2) discriminated against her because of her race and her opposition to allegedly racially discriminatory policies, in violation of the equal protection clause of the Fourteenth Amendment of the U.S.Constitution and Art. I, § 19 of the North Carolina Constitution; and 3) denied Plaintiff her right to procedural due process of law, also in violation of the Fourteenth Amendment and Art. I, § 19 of the North Carolina Constitution.

1. Federal Constitutional Claims--School Board

In order for a local government entity, such as a school board, to be held liable under 42 U.S.C. § 1983, Plaintiff must prove that the Board's official policy or custom caused the violation of Plaintiff's rights. *See Pembaur v. Cincinnati,* 475 U.S. 469, 479, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986); *see also Riddick v. School Bd. of the City of Portsmouth,* 238 F.3d 518, 524 (4th Cir.2000) (municipality's deliberate conduct must be the moving force behind alleged violation). The requirement that the constitutional violation result from official policy or custom was intended "to distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur,* 475 U.S. at 479, 106 S.Ct. at 1298. A local

government entity may not be held liable for the acts of its employees on a respondeat superior basis. *See Monell v. Department of Social Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978).

While official policy is often embodied in formal, written rules or statements, action taken by an authorized decision-maker may also constitute official policy. *See Pembaur,* 475 U.S. at 480- 81, 106 S.Ct. at 1299. An authorized decision-maker is one who "possesses final authority to establish municipal policy with respect to the action ordered." 475 U.S. at 481, 106 S.Ct. at 1299. Only action taken by a final policymaking authority may lead to municipal liability. *Id.*

These principles are important in the instant case because the Board's involvement with Plaintiff was limited. Pursuant to its final review authority over the superintendent, the Board (first through a panel, then by plenary review) approved Martin's decision to reassign Plaintiff to a teaching position and not renew her administrator contract. Only these actions, through which the Board exercised its final policymaking authority, may be the basis for Board liability. *See id.* The Board cannot be held liable for the discretionary conduct of Martin and Blanchfield over which it did not retain final review authority, as there is no respondeat superior liability under § 1983. *See Monell,* 436 U.S. at 691, 98 S.Ct. at 2036; *see also City of St. Louis v. Praprotnik,* 485 U.S. 112, 127, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988).

a. First Amendment Claim

To evaluate Plaintiff's claim that the Board's reassignment and non-renewal of her administrator contract violated her rights under the First Amendment, the court is tasked with balancing the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of

the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers,* 461 U.S. 138, 142, 103 S.Ct. 1684, 1687, 75 L.Ed.2d 708 (quoting *Pickering v. Board of Educ.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968)).

A public employee must prove several elements to establish a claim based on deprivation of free speech rights. First, Plaintiff's speech must involve a matter of public concern. *See Goldstein v. Chestnut Ridge Volunteer Fire Co.,* 218 F.3d 337, 351-52 (4th Cir.2000). This is dependent on the content, form, and context of the speech at issue. *See* 218 F.3d at 352. Second, "the employee's interest in First Amendment expression must outweigh the employer's interest in efficient operation of the workplace." *Id.* Next, Plaintiff must prove that she was deprived of a valuable government benefit or suffered adverse action tending to chill her free speech rights. *See id.* Finally, Plaintiff must establish causation--that her protected speech was a substantial factor in her employer's decision to take the adverse action. *See id.*

If the employee's speech cannot fairly be characterized as touching upon a matter of public concern, the inquiry into the employee's discharge or other alleged retaliation will end there. *Connick,* 461 U.S. at 146, 103 S.Ct. at 1690 (absent expression constituting matter of public concern, public officials should enjoy "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment"). However, even where the employee's speech does relate to a matter of public interest, it is critical to determine whether the speech is made primarily in the speaker's capacity as citizen or the speaker's capacity as employee. *See Urofsky v. Gilmore,* 216 F.3d 401, 407 (4th Cir.2000). The Supreme Court has chosen the former as more worthy of constitutional protection, in recognition of the reality that public employees often deal with matters of great

public concern in the course of their employment. To grant all public employees constitutional protection for speech made in their capacity as employees would give them "a First Amendment right to dictate to the state how they will do their jobs." *Id.; see also Connick,* 461 U.S. at 149, 103 S.Ct. at 1691 (First Amendment does not mandate that public office be operated as "roundtable for employee complaints over internal office affairs").

In this case, Plaintiff's speech encompassed not only just disciplinary practices and the use of the Time-Out Room at Lewisville, but also her disputes with her supervisor, Blanchfield. While the court grants that effective discipline within the public schools could potentially be a matter of public concern, Plaintiff's personal difficulties in getting along with her supervisor do not constitute a matter of public concern. Moreover, the court is not convinced that any of Plaintiff's speech was expressed in a capacity other than that of public employee. Plaintiff, a school administrator, was questioning the mode and manner in which students were disciplined. She expressed her views to those whom she believed were responsible for the practices at issue (presumably with the goal of changing those practices); namely, Blanchfield and the teachers who used the Time-Out Room. Moreover, she expressed her views in school forums--in faculty meetings and in conversations with her supervisor, Blanchfield. Using the context and form of Plaintiff's expression as a guidepost, *see Goldstein,* 218 F.3d at 352, the court finds that Plaintiff's speech was more in her capacity as a public school administrator than as a private citizen.

Even if the court had found that Plaintiff's speech was uttered in her capacity as a private citizen, Plaintiff has not demonstrated that her interest in First Amendment expression outweighs her employer's interest in the efficient operation of the public schools. The court has received substantial evidence

of the disruption and destruction of working relationships caused by Plaintiff's expression, some of it by Plaintiff's own admission. Plaintiff antagonized and insulted those who used the Time-Out Room and refused to assist the Time-Out Room coordinator in its administration. She failed to develop effective working relationships with other staff, driving some to appeal to the superintendent to replace her. She used profanity in an inappropriate confrontation with a teacher. She resisted feedback or constructive criticism. She repeatedly challenged her principal's judgment. She refused to rebuild an effective working relationship with Blanchfield, even after being clearly warned by Martin that she must do so or risk losing her job.[7] Defendants' interest in maintaining the effective functioning of Lewisville by removing Plaintiff, a disruptive and dividing influence, far outweighs Plaintiff's interest in First Amendment expression. *See Derrickson v. Board of Educ. of St. Louis,* 738 F.2d 351, 353 (8th Cir.1984) (noting that First Amendment did not shield teacher from adverse action resulting from teacher's "inability to work with his superiors, peers, and students in a conciliatory manner"). To hold otherwise would be to allow Plaintiff, in effect, to dictate to her employer how she should be allowed to perform her job. *See Urofsky,* 216 F.3d at 407.

As the Supreme Court stated in *Connick,* "The limited First Amendment interest involved here does not require that [petitioner] tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships." 461 U.S. at 154, 103 S.Ct. at 1694.

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[7] To be fair, Martin acknowledged that Blanchfield was not blameless in this conflict. As a result, he encouraged Blanchfield to step down as principal at Lewisville and take a new job at the district's central office. Blanchfield complied with Martin's request, even though it meant taking a pay cut.

Similarly, when it became clear to Defendants that Plaintiff's presence as an administrator at Lewisville was disrupting the school, undermining Blanchfield's authority, and destroying working relationships with teachers, their decision to reassign Plaintiff and not renew her contract did not offend the First Amendment.

Defendants' motion for summary judgment as to Plaintiff's § 1983 claim for violation of her First Amendment rights will be granted.

b. Equal Protection Claim

Plaintiff also alleges that the Board violated her Fourteenth Amendment right to equal protection under the law by discriminating against her on the basis of race. Equal protection claims of this nature, where the plaintiff is a "class of one," require proof that the plaintiff was intentionally treated differently than others similarly situated and there was no rational basis for the difference in treatment. *See Village of Willowbrook v. Olech,* 528 U.S. 562, 564, 120 S.Ct. 1073, 1074, 145 L.Ed.2d 1060 (2000). The same requirements for a prima facie case brought under Title VII or § 1981 also apply to race discrimination claims brought under § 1983 and are evaluated using the *McDonnell-Douglas* burden- shifting framework. *See St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 506 n. 1, 113 S.Ct. 2742, 2746 n. 1, 125 L.Ed.2d 407 (1993); *Richmond v. Board of Regents,* 957 F.2d 595, 598 (8th Cir.1992).

Because Plaintiff failed to establish her racial discrimination claims under Title VII or § 1981, it is unnecessary for the court to repeat its analysis here under the identical framework. Defendants' motion for summary judgment will be granted as to Plaintiff's § 1983 equal protection claim.

c. Procedural Due Process Claim

Plaintiff additionally asserts that the Board violated her Fourteenth Amendment right to procedural due process. To be entitled to constitutional due process, Plaintiff must first establish that she has a property interest in continued employment with the school district under state law. *See Royster v. Board of Trustees,* 774 F.2d 618, 621 (4th Cir.1985); *Peace v. Employment Sec. Comm'n of N.C.,* 349 N.C. 315, 321, 507 S.E.2d 272, 277 (1998). To demonstrate such an interest under North Carolina law, an employee must point to a contract, state statute or local ordinance providing a right to continued employment. *See Peace,* 349 N.C. at 321, 507 S.E.2d at 277.

However, even if an employee is protected by a valid employment contract, he or she does not have a constitutionally protected interest in any particular job. As the Fourth Circuit has observed, "[N]o authority ... supports the proposition that a property interest in the continued expectation of public employment includes the right to physically possess a job, in defiance of the stated desire of the employer." *Huang v. Board of Governors,* 902 F.2d 1134, 1141 (4th Cir.1990) (quoting *Royster,* 774 F.2d at 621). Rather, the constitutional interest of an employee working under contract is "satisfied by payment of the full compensation due under the contract." *Id.*

Plaintiff did have an employment contract as an assistant principal at the time of her adverse action. However, Plaintiff had no constitutionally protected interest in any particular job with the school district. Moreover, the Board, in affirming Martin's decision to reassign Plaintiff to a teaching position, did not reduce Plaintiff's salary to that of a teacher but honored her salary as an assistant principal for the remainder of her contract. Plaintiff received the full compensation she was due

under the contract. Thus, the Board's decision did not deprive Plaintiff of any constitutionally protected property interest.

Even if Plaintiff were constitutionally entitled to due process before being reassigned despite the fact she suffered no reduction in pay, the evidence demonstrates that she was in fact accorded a full measure of procedural due process. Plaintiff received notice and an opportunity to be heard at a meaningful time and in a meaningful manner, which are the essential elements of due process required by the Constitution. *See Peace,* 349 N.C. at 322, 507 S.E.2d at 278. Plaintiff received written notice of Martin's decision and was allowed to appeal Martin's decision to a panel of three Board members. *See* N.C.Gen.Stat. § § 115C-287.1(d), 115C-45(c). Plaintiff was represented by counsel in this proceeding, at which she presented evidence and was allowed along with her attorney to make a statement to the panel. Following the panel's 2-1 vote to affirm Martin's decision, Plaintiff was allowed to appeal the panel's decision to the full Board for review. *See* § 115C-287.1(d). The Board reviewed both the written and oral transcript of the panel's proceedings and voted to affirm the panel's decision.[8] These procedures, determined to be constitutionally adequate by the courts of North Carolina, *see Cooper v. Board of Educ.,* 135 N.C.App. 200, 205-06, 519 S.E.2d 536, 540 (1999), were far more than what Plaintiff was constitutionally due and provide no grounds for her to complain.[9]

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[8]Although Plaintiff was entitled to judicial review of this decision under state law, *see* N.C.Gen.Stat. § § 115C-287.1(d), 115C- 45(c), she did not avail herself of this option.

[9]Plaintiff, nevertheless, maintains that she was also entitled to a "plan of assistance" under school board regulations. Under this policy, "career status" employees who were experiencing performance difficulties were entitled to a

Plaintiff has not established that any policy, custom, or final decision of the Board resulted in any constitutional violations she has alleged. Consequently, the court will grant Defendants' motion for summary judgment as to each of Plaintiff's § 1983 claims against the Board.

2. Federal Constitutional Claims--Dr. Donald Martin

Plaintiff also asserts federal constitutional claims against Martin in both his official and individual capacities. However, the claims which Plaintiff asserts against Martin in his official capacity actually constitute claims against the entity of which he is an agent, the school district. *See Kentucky,* 473 U.S. at 165-66, 105 S.Ct. at 3105. Because Plaintiff has also asserted claims against the school district by suing the Board, the claims against Martin in his official capacity are redundant with those claims and will be dismissed. *See Hicks v. Halifax County Bd. of Educ.,* 93 F.Supp.2d 649, 667 (E.D.N.C.1999).

As to the claims against Martin in his individual capacity, Martin has raised the defense of qualified immunity. Under the doctrine of qualified immunity, public officials are shielded from liability for civil damages to the extent their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). In determining whether Martin's conduct violated a clearly established right, the focus "is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being

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"plan of assistance" designed to help them back on track. However, Plaintiff was not a career status employee as defined under North Carolina law and thus is not entitled to a plan of assistance. *See* N.C.Gen.Stat. § 115C-325(c)(3).

challenged." *DiMeglio v. Haines,* 45 F.3d 790, 803 (4th Cir.1995). Thus, asserting a violation of the "right to due process," without greater particularity, cannot overcome the defense; the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 804.

In light of the court's discussion of Plaintiff's First Amendment claims against the Board, *supra,* it is apparent that Plaintiff's rights with regard to free expression in the course of her public employment are anything but clearly established. The contours of those rights depend first on whether Plaintiff's expression dealt with a matter of public concern or a primarily employment-related matter, and whether Plaintiff's speech was uttered in her capacity as a public employee or in her capacity as a private citizen.

These issues, standing alone, are difficult legal issues to adjudicate. However, even if Martin could readily ascertain that Plaintiff was speaking as a private citizen on a matter of public concern, he would still have to undertake the difficult balancing test set forth in *Pickering,* i.e., whether Plaintiff's free expression rights were nevertheless outweighed by the school district's interest in the efficient operation of its public schools. Due to the complexity of this inquiry, the court cannot find that Martin, or a reasonable person in his position, would have known that his conduct violated Plaintiff's clearly established rights. As the court in *DiMeglio* forecasted, "only infrequently will it be 'clearly established' that a public employee's speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a 'particularized balancing' that is subtle, difficult to apply, and not yet well-defined." 45 F.3d at 806 (quoting *Connick,* 461 U.S. at 150, 103 S.Ct. at 1691-92); *see also Benson v. Allphin,* 786 F.2d 268, 276 (7th Cir.1986) (noting that a constitutional rule requiring that competing interests be

balanced is "so fact dependent that the 'law' can rarely be considered 'clearly established' ").

Moreover, Plaintiff has failed to offer any closely analogous cases tending to prove that Plaintiff's rights in this regard were clearly established. In response to Martin's assertion of qualified immunity, Plaintiff offers the following:

> Martin cannot establish his defense of qualified immunity as a matter of law. Love-Lane's rights were established at the time she exercised them. *Hall v. Marion School District No. 2,* 31 F.3d 183 (4th Cir.1994). Martin was aware that Love-Lane was complaining of racial practices, and that Blanchfield resented Love-Lane's objections. Love-Lane Aff., ¶ 41. Nevertheless, as argued above, Martin refused to transfer Love-Lane and left her destiny to the whims of her superior.

(Pl.'s Br.Resp. Defs.' Mot.Summ.J. at 17.) This statement is utterly insufficient to prove that Plaintiff's rights to free expression at the expense of the effective functioning of the school were clearly established. The *Hall* case, moreover, is not clearly analogous to Plaintiff's case. The plaintiff in *Hall,* a teacher, wrote numerous letters to the editor concerning mismanagement of taxpayers' funds by the Board that were published in several newspapers. She also made several FOIA requests for information concerning expenditures by school officials, and wrote numerous letters to state and federal public officials about her complaints with the school system. *See Hall v. Marion Sch. Dist. No. 2,* 31 F.3d 183, 186-88 (4th Cir.1994). Plaintiff's expression, by contrast, occurred in school forums and primarily comprised complaints about her supervisor's judgment and the day to day functioning of the school.

With regard to Plaintiff's equal protection claim, Plaintiff's right not to be treated adversely on the basis of her race is clearly established, and a reasonable school official would be aware of this right. Under the circumstances, however, Martin would have had no reason to believe that his conduct violated that right. *See Harlow,* 457 U.S. at 818, 102 S.Ct. at 2738. There is no evidence suggesting that Martin reassigned Plaintiff or decided not to renew her contract on the basis of her race. Rather, as is clear from the analysis of Plaintiff's Title VII claim, he did so for legitimate, nondiscriminatory reasons--Plaintiff's inability to work effectively with others, defiance of authority, disruptive behavior, and poor final evaluation. In short, Martin's conduct did not violate Plaintiff's rights under the equal protection clause.

Similarly, Martin is entitled to qualified immunity on Plaintiff's procedural due process claim. As detailed above in the analysis of Plaintiff's due process claim against the Board, Plaintiff received a full measure of constitutional due process even though she was not constitutionally entitled to such process. While Plaintiff's right to procedural due process is clearly established at a general level, her entitlement to constitutional due process, even where she was accorded the full financial benefit of her contract, is not. In any event, it cannot be said that Martin violated Plaintiff's right to due process when he provided her advance written notice of his decision and complied with all relevant statutory provisions regarding Plaintiff's two grievance hearings, provisions which have been upheld as constitutionally sufficient. *See Cooper,* 135 N.C.App. at 205-06, 519 S.E.2d at 540.

The court finds that Martin is entitled to qualified immunity for each of Plaintiff's federal constitutional claims. Consequently, the court will grant Defendants' motion for summary judgment as to each of these claims.

3. State Constitutional Claims

Claims asserted under the North Carolina Constitution may be asserted only against state officials acting in their official capacity, not in their individual capacity. See DeWitt v. Mecklenburg County, 73 F.Supp.2d 589, 605-06 (W.D.N.C. 1999) (citing *Corum v. University of North Carolina*, 330 N.C. 761, 788, 413 S.E.2d 276, 293 (1992)). Therefore, claims against Martin in his individual capacity will be dismissed.

Claims under the North Carolina Constitution for violation of Plaintiff's free speech rights are evaluated under the same rubric as claims brought under the First Amendment of the U.S. Constitution. *See id.* at 606 n. 12 (citing *State v. Petersilie*, 334 N.C. 169, 184, 432 S.E.2d 832, 841 (1993)). Because the court has already determined that Plaintiff's free speech rights under the Federal Constitution have not been violated by Defendants, Plaintiff's state constitutional free speech claim also fails.

Plaintiff's equal protection claim under the state constitution is also deficient. Under North Carolina law, a cause of action under the state constitution exists only in the absence of an adequate state remedy. *See Hughes v. Bedsole*, 48 F.3d 1376, 1383 n. 6 (4th Cir.1995). Plaintiff could have brought suit in state court as allowed under North Carolina General Statute § 115C-287.1(d) seeking review of the Board's decision. Because Plaintiff did not do so, she is barred from raising a state constitutional claim here.

Finally, Plaintiff's claim under the state constitution for violation of her procedural due process rights fails because Plaintiff has not established that she was deprived of a protected property right. *See* discussion of Plaintiff's federal claims at II.C(1)(c), *supra*.

Defendants' motion for summary judgment on Plaintiff's state constitutional claims against Martin in his official capacity and the Board will therefore be granted.

III. CONCLUSION

For the reasons stated herein, the court will grant Defendants' Motion for Summary Judgment on each of Plaintiff's claims not already dismissed herein.

A judgment in accordance with this memorandum opinion shall be filed contemporaneously herewith.

JUDGMENT

For the reasons stated in the memorandum opinion filed contemporaneously herewith,

IT IS ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is granted.

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

DECOMA LOVE-LANE,
Plaintiff-Appellant,
v.
DONALD MARTIN, Individually, and in his official capacity as Superintendent of THE WINSTON-SALEM/FORSYTH COUNTY SCHOOLS; WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION,
Defendants-Appellees.

No. 02-1465
CA-99-735

February 18, 2004

On Petition for Rehearing En Banc

The appellees' petition for rehearing en banc was submitted to this Court. As no member of this Court requested a poll on the petition for hearing en banc,

IT IS ORDERED that the petition for rehearing en banc is denied.

Entered for Judge Wilkinson, Judge Michael, and Judge Gregory.